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Supreme Court, U.S.
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No. 95-897

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,
Petitioners,
v.
DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

MICHAEL T. LEIBIG *
CARLA MARKIM SIEGEL
ZWERDLING, PAUL, LEIBIG, KAHN, THOMPSON & WOLLY
10640 Page Avenue, Suite 200
Fairfax, Virginia 22030
(703) 934-2675

ROBERT KOSTER
KING, WEICK, HOCKENSMITH & SHEBY
12801 Flushing Meadow
St. Louis, Missouri 63105

RUDOLFO RIVERA
FORTUS, ANDERSON & RIVERA
201 South Central, Suite 103
Clayton, Missouri 63105
Counsel for Petitioners

* Counsel of Record

JOHN B. RENICK *
ALAN L. BERGER
JAMES N. FOSTER, JR.
MCMAHON, BERGER, HANNA, LINAHAN, CODY & MCCARTHY
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
(314) 567-7350

JUDITH ANNE RONZIO
Legal Advisor
ST. LOUIS METROPOLITAN POLICE DEPARTMENT
1200 Clark Street
St. Louis, Missouri 63103
(314) 444-5609

Counsel for Respondents

PETITION FOR CERTIORARI, FILED DECEMBER 7, 1995
CERTIORARI GRANTED, JUNE 24, 1996

99 pp

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RELEVANT DOCKET ENTRIES

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Case No. 88-2071-C-4

Date	Proceedings
10/25/88	Complaint
11/30/88	Answer
12/19/88	Amended Complaint (First)
12/29/88	Answer
09/25/89	Amended Answer
02/21/90	Order Bifurcating Litigation and Discovery
04/06/90	Defendants' Motion for Summary Judgment
05/21/90	Plaintiffs' Motion for Summary Judgment and Response to Defendants' Motion for Summary Judgment
06/15/90	Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment
07/18/90	Reply Memorandum to Defendants' Opposition to Plaintiffs Motion for Partial Summary Judgment
10/30/91	Order and Memorandum Granting Summary Judgment as to Plaintiff Lieutenant Delgado, Denying Plaintiffs Partial Summary Judgment
04/19/93	Order and Memorandum on Amended Complaint and Allowing 29 U.S.C. 216(b) Consenters
04/30/93	Amended Complaint (Second)
05/12/93	Amended Answer (Second)
05/24/93	Consent Forms, 29 U.S.C. § 216(c)

Date	Proceedings
06/22/93	Consent Forms, 29 U.S.C. § 216(c)
09/15-9/21/93	Bench Trial
12/10/93	Post-Trial Hearing
02/17/94	Order Finding Moot Defendants' Motion to Compel and Motion to Quash
04/22/94	Findings of Fact and Conclusion of Law
08/26/94	Judgment
09/16/94	Notice of Appeal
06/25/96	Denial of Costs Without Prejudice

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case Nos. 94-3355 and 94-3534

Date	Proceedings
09/23/94	Appeal Docketed (94-3355)
09/08/95	Opinion Filed and Judgment Entered

IN THE UNITED STATES SUPREME COURT

Case No. 95-897

Date	Proceedings
12/07/95	Petition for Writ of Certiorari (95-897)
06/24/96	Order Granting *Certiorari*

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

Cause No. 88-2071-C-4

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

vs.

ROBERT BAER, *et al.*,
Defendants.

PLAINTIFFS' ANSWERS TO DEFENDANTS' SECOND INTERROGATORIES TO PLAINTIFFS

Come now Plaintiffs Buehler, Long, Delgado, Corona, Pona, Milne, and Hall and file their answer to Defendants' Second Interrogatories to Plaintiffs.

* * * *

12. State whether Plaintiffs' claim that their biweekly salaries have been subject to deduction for absences occasioned by the St. Louis Metropolitan Police Department or by the operating requirements of the Department. If answered in the affirmative:

(a) State, in detail, the basis for such claim and identify any writings relied upon to support such claim; and

(b) Specify each and every instance in which such a deduction was made, giving the date(s), reasons for the deduction, number of hours involved, and the amount of the deduction.

ANSWER:

No. Plaintiffs salaries have not been subject to deductions for absences occasioned by the Department.

13. State whether Plaintiffs claim their biweekly salaries have been subject to deductions for absences from work of less than a day; i.e., a scheduled shift. If answered in the affirmative:

(a) State, in detail, the basis for such claim and identify any writings relied upon to support such claim; and

(b) If not included in the answer to subparagraph (a) above, state whether Plaintiffs' claim that requiring the use of sick leave, vacation time, furlough with pay, or previously banked overtime hours for absences from work of less than a day constitutes a deduction from their biweekly salaries even though the amount of their compensation is not affected; and

(c) Specify each and every instance in which a deduction was made for an absence from work of less than a day in circumstances other than where sick leave, vacation time, furlough with pay, or previously banked overtime hours were used to compensate for such absence, giving the date(s), reasons for the deduction, number of hours involved, and the amount of the deduction.

ANSWER:

Yes. Plaintiffs salaries have been subject to deduction.

(a) As per the Memo of Major John Walsh dated August 2, 1988 and Memo of Lt. Colonel Calzona Hall dated August 13, 1988. It is the policy of the Department to dock from plaintiffs overtime bank for any time missed from work for personal or other reasons. Said docking can be in increments of less than one day.

(b) Yes.

(c) To the best of plaintiffs' knowledge, they have not been docked for absences of less than a day. However, plaintiffs believe that their wages would be subject to such deduction if they were absent for less than a day and they were not excused by their superior.

14. State whether Plaintiffs have ever suffered a loss of pay in an amount less than the equivalent of a day's work as a result of a disciplinary suspension or any other disciplinary action. If answered in the affirmative, specify each and every instance of such an occurrence, giving the date(s), reasons for discipline imposed, the amount of pay lost, and the basis for calculation of said amount if known.

ANSWER:

No

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C-4

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

v.

ROBERT BAER, *et al.*,
Defendants.

REQUEST FOR ADMISSIONS

Come now Defendants, by their attorneys, pursuant to Rule 36, Federal Rules of Civil Procedure, and request Plaintiff James Gilbert Hall to make the following admissions, for purposes of the pending action only.

1. Parts III and IV of Exhibit A, attached hereto, accurately describe the primary function and specific duties and responsibilities regularly performed by Plaintiff as a Police Sergeant for the period from April 15, 1986 to the present.

2. Plaintiff has customarily and regularly directed and/or supervised the work of two (2) or more police officers, in his capacity as a Police Sergeant, for the period from April 15, 1986 to the present.

3. Plaintiff, in his capacity as a Police Sergeant, has been paid on an annual salary basis which equates to more than Two Hundred Fifty Dollars ($250.00) per week, for the period from April 15, 1986 to the present.

4. Plaintiff, in his capacity as a Police Sergeant, has customarily and regularly devoted more than half his time to the performance of nonmanual work for the period from April 15, 1986 to the present.

* * * *

RESPONSES TO REQUESTS FOR ADMISSIONS

[December 16, 1988]

Comes now plaintiff, Francis Bernard Auer, and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admit.
4. Deny.

* * * *

RESPONSE TO REQUESTS FOR ADMISSIONS

[December 16, 1988]

Comes now plaintiff, James Gilbert Hall, and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admit.
4. Deny.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Herman Ubben and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff James E. Long and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Joseph D. Beffa and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Eugene Milne and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Richard Buehler and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Anthony Pona and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Michael A. Indelicato and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff George McDonagh and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Francis B. Corona and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Roy Burgdorf and for his response to Defendants' Request for Admissions states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.

* * * *

RESPONSE TO REQUEST FOR ADMISSIONS

[April 11, 1989]

Comes now Plaintiff Manuel M. Delgado, and for his response to Defendants' Request for Admission states:

1. Deny.
2. Admit.
3. Admits being paid more than $250.00 per week; denies this is "salary" as defined by FLSA.
4. Deny.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 88-2071-C-4

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,
v.
JAMES O'FLYNN, *et al.*,
Defendants.

STATEMENT OF FACTS NOT IN DISPUTE

* * * *

8. Plaintiffs' compensation is converted into an hourly equivalent. It is the policy of the Police Department to dock from officers' "overtime banks" in hourly increments for time missed for personal or other reasons. The "overtime banks" are compensatory time banks which sergeants carried over when they were promoted. *See* Plaintiffs' Answers to Defendants' Second Interrogatories #13; Cortelyou Dep. at 13, Burgdoff Dep. at 49. Plaintiffs' "rec. time" banks are kept in hours, not days. Cortelyou Dep. at 17. Plaintiffs who work night shifts are paid a shift differential for the period between 11:00 p.m. and 7:00 a.m. This differential is measured in hour increments. Some plaintiffs receive or have received this shift differential. *See, e.g.,* Auer Dep. at 7; Day Dep. at 5-6. Sergeants can lose pay, vacation time or sick leave in hour increments for missing part of a day. *See* Facts 9-10 below. Sick time is calculated in hour increments. Cortelyou Dep. at 18.

9. Plaintiffs' compensation is and has been subject to deduction for absences of work of less than one day. *See, e.g.,* Scheetz Dep. at 31-33 and Police Department Rule 7.004(c)(1) (lose pay as AWOL); August 2, 1988

Memo from Major John Walsh (Attachment 1); and August 23, 1988 Memo from Lt. Colonel Calonzona Hall (Attachment 2) (loss of accrued sick or vacation time); *see also* Pattison Dep. at 13 (loss of pay for missing part of a day when disciplined); Plaintiffs' Answers to Defendants' Second Interrogatories to Plaintiffs #13.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 88-2071-C-4

FRANCIS BERNARD AUER, *et al.*,
Plaintiffs,

v.

DAVID A. ROBBINS, *et al.*,
Defendants.

JOINT STIPULATION OF UNCONTESTED FACTS

* * * *

2. The individuals who, in their official capacities, comprise the present Board of Police Commissioners are: James Conway, Charles Mischeaux, Matthew Padberg, Anne-Marie Clarke, Freeman Bosley, *ex-officio*. These individuals, as comprising the Board of Police Commissioners, are the true Defendant(s) in this action. The Board of Police Commissioners (Board) is an entity organized and authorized pursuant to Section 84.020, R.S.Mo., and is the statutorily-created state agency responsible for governing the St. Louis Metropolitan Police Department. The Board is the employer of plaintiffs within the meaning of the FLSA, 29 U.S.C. Section 203 (d). The individuals defendants are sued herein in their official capacities.

* * * *

10. Each of the plaintiffs, at all times pertinent hereto, while holding the rank of sergeant, received at least Two Hundred Fifty Dollars ($250.00) per week.

11. Defendants' Exhibit C accurately reflects the base annual compensation paid to the officers of the Police

Department by rank for the periods indicated. Annual compensation amounts for all officers, including the Chief of Police, are set by the Missouri State Legislature. It does not reflect, in all cases, total compensation received by the officers.

[Signature Block Omitted]

METROPOLITAN POLICE DEPARTMENT
CITY OF SAINT LOUIS
OFFICE OF THE CHIEF OF POLICE
SPECIAL ORDER

Section VIII

Date Issued: January 6, 1993 Order No.: 93-S-1

Effective Date: January 11, 1993 Expiration: Indefinite

Reference: _____

Cancelled Publications: _____

Subject: SHIFT DIFFERENTIAL COMPENSATION—COMMISSIONED OFFICERS

TO: ALL BUREAUS, DISTRICTS AND DIVISIONS

A. *APPLICABILITY*

All commissioned officers will receive shift differential pay on the basis of any whole hours worked between 11:00 P.M. and 7:00 A.M. at the rate of ten percent of the officer's base hourly pay.

B. *PROCEDURES*

1. *Regular Shift Differential*

Shift differential is reported in whole hour units only beginning at 11:00 P.M. and ending at 7:00 A.M., for a maximum of 8 hours per 24 hour period. Shift differential pay will not be granted for any period of time worked which is less than a whole hour. Shift differential on a scheduled watch is indicated in the attendance column of the Duty Roster Worksheet.

2. *Shift Differential in Conjunction with Overtime—Police Officer Rank and Below*

a. Shift differential in conjunction with overtime worked between 11:00 P.M. and 7:00

A.M. will also be computed in terms of whole hours only. Shift differential pay will not be granted for any period of overtime worked which is less than a whole hour.

b. Shift differential earned as a result of overtime will be recorded in section 4 of the "Compensation Form", GEN-162, which will be prepared in duplicate.

Example: Officer *assigned to 2:50 P.M. to* 10:50 P.M. shift works overtime until 1:00 A.M.—two (2) hours of shift differential have been earned.

c. Shift differential hours earned in conjunction with overtime will be entered into the computerized duty roster system by the Budget and Finance Division. The original copy of the overtime form will be forwarded with the Duty Roster Worksheet within 24 hours. The duplicate copy will be filed in the unit.

3. *Shift Differential When Sergeants and Above Work Beyond Their Regular Tour of Duty*

a. Shift differential earned when a sergeant or above works beyond his regular tour of duty, between 11:00 P.M. and 7:00 A.M., will be computed in terms of whole hours only. Shift differential pay will not be granted for any period of time worked which is less than a whole hour.

b. The shift differential earned as a result of working beyond the regular tour of duty will be recorded in section 4 of the "Compensation Form", GEN-162, which will be prepared in duplicate and forwarded as specified above.

84.160. Annual salary tables—overtime, how compensated—other employment benefits—unused vacation, compensation for certain officers

1. Based upon rank and length of service, the board of police commissioners may authorize maximum amounts of compensation for members of the police force in accordance with the following tables.

* * * *

2. From July 1, 1991:

Salary Matrix—Turnkey Through Chief of Police—Fiscal Year 1991/1992 (5%)

Yrs.	P.O. Salary	Sgt. Salary	Lieut. Salary	Capt. Salary	Maj. Salary	Lt. Col. Salary	Chief Salary
0	24600						
1	26322						
2	27552						
3	29028						
4	30135						
5	31119	38276					
6	32226	38487					
7	32472	38698	43868				
8	32693	38909	44079				
9	32915	39120	44290	49010			
10	33136	39331	44501	49221			
11	33358	39542	44712	49432	53732		
12	33579	39753	44923	49643	53943	57984	67158
13	33800	39964	45134	49854	54154	58195	67601
14	34022	40175	45345	50065	54365	58406	68044
15	34243	40386	45556	50276	54576	58617	68486
16	34465	40597	45767	50487	54787	58828	68929
17	34686	40808	45978	50698	54998	59039	69372
18	34907	41019	46189	50909	55209	59250	68915
19	35129	41230	46400	51120	55420	59461	70258
20	35350	41441	46611	51331	55631	59672	70700
21	35572	41652	46822	51542	55842	59883	71143
22	35793	41863	47033	51753	56053	60094	71586
23	36014	42074	47244	51964	56264	60305	72029
24	36236	42285	47455	52175	56475	60516	72472
25	36457	42496	47666	52386	56686	60727	72914
26	36679	42707	47877	52597	56897	60938	73357
27	36900	42918	48088	52808	57108	61149	73600
28	37121	43129	48299	53019	57319	61360	74243
29	37343	43340	48510	53230	57530	61571	74686
30	37564	43551	48721	53441	57741	61782	75128

From July 1, 1991, each turnkey beginning his first year or who has served more than one year as a turnkey may receive twenty-two thousand three hundred forty-six dollars per annum; each turnkey who has served more than five years as a turnkey may receive twenty-four thousand four hundred sixty-three dollars and eighty-one cents per annum; and each turnkey who has served more than nine years as a turnkey may receive twenty-five thousand four hundred forty-nine dollars and twelve cents per annum.

3. Each of the above-mentioned salaries shall be payable in biweekly installments. Each officer of police and patrolman whose regular assignment requires nonuniformed attire may receive, in addition to his salary, an allowance not to exceed three hundred sixty dollars per annum payable biweekly. No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed to any officer of the rank of sergeant or above.

4. It is the duty of the municipal assembly or common council of the cities to make the necessary appropriation for the expenses of the maintenance of the police force in the manner herein and hereafter provided; provided, that in no event shall such municipal assembly or common council be required to appropriate for such purposes (including but not limited to costs of funding pensions or retirement plans) for any fiscal year a sum in excess of any limitation imposed by article X, section 21, Missouri Constitution; and provided further, that such municipal assembly or common council may appropriate a sum in excess of such limitation for any fiscal year by an appropriations ordinance enacted in conformity with the provisions of the charter of such cities.

5. The board of police commissioners shall pay additional compensation for all hours of service rendered by turnkeys, probationary patrolmen and patrolmen in excess of the established regular working period, and the rate of compensation shall be one and one-half times the regular

hourly rate of pay to which each member shall normally be entitled; except that, the court time and court standby time shall be paid at the regular hourly rate of pay to which each member shall normally be entitled. No credit shall be given or deductions made from payments for overtime for the purpose of retirement benefits.

* * * *

REPORT AND RECOMMENDATIONS OF THE PRESIDING OFFICER AT PUBLIC HEARINGS ON PROPOSED REVISIONS OF REGULATIONS, PART 541

Defining the Terms

"Executive" "Administrative"

"Professional"

"Local Retailing Capacity"

"Outside Salesman"

as contained in Section 13(a)(1) of the Fair Labor Standards Act

I. "Stein Report", October 10, 1940
(Harold Stein, Presiding Officer)

II. "Weiss Report", June 30, 1949
(Harry Weiss, Presiding Officer)

III. "Kantor Report", March 3, 1958
(Harry S. Kantor, Presiding Officer)

UNITED STATES DEPARTMENT OF LABOR
W. WILLARD WIRTZ, Secretary

U.S. Wage and Hour and Public Contracts Divisions
CLARENCE T. LUNDQUIST, Administrator
Washington, D.C.

"Stein Report"

October 10, 1940

* * * *

Section II. THE ADMINISTRATOR'S AUTHORITY UNDER SECTION 13(a)(1) OF THE ACT

ADMINISTRATOR HAS BROAD POWERS

It was freely admitted by interested parties that the Administrator is given a large degree of discretion under section 13(a)(1) of the Fair Labor Standards Act.[5] It is clear from the very terms of the act itself that Congress felt that the mere use of the phrase "employed in a bona fide executive capactiy" etc. was adequate as a standard, but inadequate as a detailed rule to guide employers, employees, and the courts. It therefore gave the Administrator the responsibility of amplifying and describing more precisely the type of employees to whom the exemption would be applicable. Use by Congress of the word "delimited" as well as the word "defined" is a further indication of the extent of the Administrator's discretionary power under this section of the act. Therefore, the Administrator is responsible not only for determining which employees are entitled to the exemption, but also for drawing the line beyond which the exemption is not applicable.

EXEMPTION SHOULD BE INTERPRETED NARROWLY

The general rule in a statute of this nature, that coverage should be broadly interpreted and exemptions narrowly interpreted, is so well known as to need little elaboration here. This doctrine was recently restated by the Circuit Court of Appeals for the Eighth Circuit in its

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[5] See, for example, statements of Elisha Hanson, American Newspaper Publishers Association, and Morris Zeitlin, International Federation of Architects, Engineers, Chemists, and Technicians. Hearing July 25-9 vol. II, p. 317 and vol 1, p. 149, respectively.

opinion in the Hawkeye case,[6] in conection with the exemption in section 13(a)(5) of the act. In this opinion, which is equally applicable to the problems of definition and delimitation under section 13(a)(1), the court said:

> The manifest declared purpose of the statute was to eradicate from interstate commerce the evils attendant upon lower wages and long hours of service in industry. Accepting this as the declared purpose of the act, exemption would tend to defeat its purpose. The statute is remedial, with a humanitarian end in view. It is, therefore, entitled to a liberal construction.

Later the opinion quotes the following from *United States* v. *Dickson:*[7]

> In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof.

The *Hawkeye* opinion continues:

> This rule of construction is applicable even though the statute contains certain penal provisions. Here no penalties are sought to be enforced but remedies. In such circumstances, exemptions should be construed strictly.

CHANGES ARE RECOMMENDED

Certain modifications of the present definitions are recommended in this report. These recommendations should in no way be construed, however, as an admission that the present definitions are either improper or beyond the scope of the Administrator's statutory authority. They

[6] *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) (adv. ops.) 52 (C. C. A. 8th, 1940).

[7] 40 U.S. 141 (1841).

should be construed, rather, as evidence that improvements can be made in the light of actual experience. The investigation shows not only that the present definitions are not perfect,[8] but also that no definition can ever be expected to be perfect. And it also shows that the Administrator's discretionary powers are broad enough to cover various possible definitions, all of which would be well within his legal rights. This was conceded by many witnesses.[9]

CHANGES CANNOT BE RETROACTIVE

This point is of some consequence, since it means that any substantive change in the regulations can affect only the future status of the employees concerned. The amendments do not and cannot in any way affect the responsibility of employers toward their employees from October 24, 1938, until the date of the amendment of the regulations. Both the present and the proposed regulations are, it is believed, entirely legal. Both are in full accord with the general policy of Congress as expressed in the preamble of the act and both give practical effect to the specific statutory exemption created by Congress in section 13(a)(1). Certain substantive changes are recommended, partly to describe the properly exempt groups of employees more precisely and partly to make the extent of the exemptions more easily understandable. This will aid in the effective enforcement of the act.

Section III. EXECUTIVE AND ADMINISTRATIVE

JOINT DEFINITION CRITICISED

Of the numerous criticisms made of the present regulations there is perhaps none so frequently repeated as that

[8] Reports were requested and obtained from all the regional offices of the division on the experiences of inspectors in applying the definitions to actual cases.

[9] Statements of Elisha Hanson and Morris Zeitlin, op. cit., note 5.

the Administrator erred in not making separate definitions of the two words "executive" and "administrative." In some instances it was merely suggested that there would be certain desirable practical results obtained by separating the terms.[10] In other instances the Administrator was charged with failure to carry out his statutory responsibility by not making separate definitions.[11] The validity of this contention is doubtful, since "executive" and "administrative" are used synonymously in common speech and in court decisions.[12] Furthermore, this contention was usually coupled with a proposal so drafted that any employee who could qualify under the "executive" definition would also invariably qualify under the "administrative" definition.[13] In other words, the definition of the term "administrative" was made so broad as to surround and completely engulf the term "executive."

Clearly the Administrator would not fulfill an alleged responsibility to define the terms separately by promulgating two different sets of words one of which renders the other superfluous. If the present investigation resulted in the conclusion that an appropriate definition of the term "administrative" must be so broad as to deny independent value to the definition of the term "executive," it would

[10] Statement of Alexander Konkle, Machinery and Allied Products Institute, record of June 3 and 5 hearing, vol. II, p. 252.

[11] Statement of Clarel B. Mapas, Mid-Continent Oil & Gas Association; record of June 3 and 5 hearing, vol. II, p. 142; Statement of Homer Mitchell, Motion Picture Producers and Distributors of America, record of July 25-29, hearing, vol. I, p. 37.

[12] See, e.g., Words and Phrases, vol. I, p. 198; second series, vol. 2, p. 383; third series, vol. I, p. 277; *Reint v. Allen*, 169 La. 1046, 126 So. 548 (1930); *Nissen v. City of Winston Salem*, 206 N. C. 888, 175 S. E. 310 (1934); *In re Heafy*, 285 N. Y. S. 180, 247 App. Div. 277 (1936), affirmed *Heafy v. McCabe*, 1 N. E. (2nd) 357, 270 N. Y. 616 (1936).

[13] For example, see proposed redefinitions submitted by Wholesale Dry Goods Institute, Inc., Montgomery Ward & Co., National Lumber Manufacturers Association, and American Bankers Association.

be wise to draft a single definition, as at present. However, careful analysis shows that this is not a necessary or even the best conclusion.

The present definition of the terms "executive" and "administrative" applies with particular aptness to persons who are commonly called "bosses." The range of exemption is broad. It extends from the president of a large and complex corporate structure down to the foreman in charge of a very minor department. Although certain minor modifications are proposed below, the present definition does describe and exempt the person who possesses and wields specific executive authority. However, the investigation also shows that in modern business there has been an increasing use of persons whose authority is functional rather than departmental. Primarily they determine or affect policy or carry out major assignments rather than give orders to individuals.[14] Many of these persons have mixed responsibilities and succeed in qualifying under the present definition, but there is a large group who either do not qualify or whose qualifications are dubious.

SEPARATE DEFINITIONS ADVISABLE

The investigation justifies the conclusion that a reasonable interpretation of section 13(a)(1) can include exemption for certain employees with miscellaneous policy-making or policy-executing responsibilities. This exemption can be made effective most easily by drafting separate definitions of the terms "executive" and "administrative." While the usage of the two terms is so vague and so overlapping that there is no generally recognized and precise line of demarcation between them, it does no violence to the common understanding of the words to apply "executive" to the person who is a boss over men and to apply

[14] Examples of this type of employee are executive assistants, traveling inventory men, purchasing agents, tax experts, and safety directors.

"administrative" to the person who establishes or affects or carries out policy but who has little or no authority over the specific actions of other individuals. Doubtless the present single definition could be so amplified as to include this latter group within its scope, but the regulations will be more easily understood and administered if a separate definition and delimitation is adopted for the term "administrative." [15]

Section IV. SALARY TESTS

SALARY TESTS FOR THE VARIOUS TYPES OF EMPLOYMENT

With few exceptions, there was general agreement on the appropriateness of a salary test for the terms "executive" and "administrative." [16] It was widely conceded that the terminology of section 13(a)(1) implies a status which cannot be attained by those whose pay is close to or below the universal minimum envisaged in the act. It

[15] Compare the distinction between "administration," "management," and "operation" in the article entitled "Administration and Organization, Functions of" in Pitman's Dictionary of Industrial Administration, vol. I, p. 10. "Administration" is explained as the policy-making function, "management" as the policy-executing function.

[16] A salary qualification was included in proposed redefinitions submitted by the following: Shell Oil Co., Mid-Continent Oil & Gas Association, National Wholesale Druggists' Association, Council of National Wholesale Associations, Indiana Manufacturers' Association, United Wholesale Grocers Association Inc., American Retail Federation, Manufacturers' Association of Connecticut Inc., National Association of Manufacturers, National Association of Ornamental Metal Manufacturers, Oklahoma Stripper Well Association, Insulation Board Institute, Motion Picture Producers and Distributors of America, National Small Business Men's Association, American Newspaper Publishers' Association, Edison Electric Institute, National Association of Broadcasters, and International Brotherhood of Electrical Workers. The alternative redefinitions of "executive" and "administrative" submitted by the American Bankers Association were based entirely on a salary qualification.

was further pointed out that the good faith specifically required by the act is best shown by the salary paid. A more detailed examination of these matters will be found below in sections VI and VII of this report.

The propriety of a salary test for professional employees was not given such full consideration at the hearings but insofar as the question was raised, there was considerable agreement on its appropriateness; this is discussed in section VIII. On the other hand, it was apparently universally assumed that there would be no salary test in the definition of "outside salesman"; this opinion is commented on in section IX.

The amounts proposed for the various definitions varied from nothing to $5,000. Further, a considerable number of definitions suggested different salary tests for the different terms, and this is recommended below. However, it was notable that only one of the proposals included differentials based on regional or population differences. This proposal, which has not been adopted in the recommendations, requires analysis.

REGIONAL AND POPULATION SALARY DIFFERENTIALS

It was proposed by the American Bankers Association and various other parties that various salary minima be established. Generally speaking, these proposals suggested different minima for different sized communities.[17] Other proposals suggested either varying minima or a single minimum specifically designed to take into account some local customary salary base. Furthermore, some parties claimed that the Administrator did not have authority and should not establish a general national minimum require-

[17] The American Bankers' Association's alternative redefinition for "administrative" provided for six different salary qualifications varying from $80 a month for those employed in towns having a population of less than 10,000 to $200 a month for those employed in cities having a population of 1,000,000 or more.

ment for exemption.[18] Aside from the serious difficulties in enforcement that would be involved, these various suggestions fail to take into account the fact that the Fair Labor Standards Act itself has as an objective "a universal minimum wage of 40 cents an hour" and contemplates lower differential minima only as a temporary device in reaching the universal minimum as rapidly as possible.

Further, it should be recognized and admitted that the minimum salary qualification in the definitions of "executive," "administrative," and "professional" must be in each instance an approximation of what will best effectuate the purposes of the act. Like most laws of national application, the act itself and the regulations issued thereunder cannot pretend to be scientific in the sense of taking into account every small variation occurring over the length and breadth of the country. To make enforcement possible and to provide for equity in competition, a rate should be selected in each of the three definitions which will be reasonable in the light of average conditions for industry as a whole. In some instances the rate selected will inevitably deny exemption to a few employees who might not unreasonably be exempted, but, conversely, in other instances it will undoubtedly permit the exemption of some persons who should properly be entitled to the benefits of the act.

Section V. THE EXEMPTION OF ALL WHITE-COLLAR WORKERS

LEGAL ARGUMENTS

Some of the proposals, most notably perhaps the proposal of the Southern States Industrial Council (as originally presented in written form)[19] would have the effect of exempting all of that very large group of persons known loosely as "white collar workers"—generally speaking, all employees except laborers, machine operators and tenders, craftsmen, and maintenance workers. It is unnecessary herein to discuss in detail the various legal arguments that were advanced in support of the proposition that such workers are not covered by the act at all. The Administrator has on numerous occasions expressed the opinion that white collar workers as such are entitled to the benefits of the act[20] and his opinion is, of course, followed in this report. Under the contrary opinion the specific statutory exemptions for named groups of typical white collar employees would not be needed nor would there be any occasion for a reexamination of Regulations, Part 541. However, it was urged alternatively by some that, while the general coverage of the statute might be thought to include "white collar" workers, the terms "executive," "administrative," and "professional" (and presumably "outside salesman") in and of themselves should be construed and were meant by Congress to exclude from the benefits of the act all white collar workers. Surely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the act. The theory of general exemption is further negated by the grant of power to the Administrator to define and delimit those terms.

OVERTIME AND "IN-SERVICE" TRAINING

In addition to the legal arguments advanced, it was stated as a reason for exempting "white collar" workers that the overtime penalty interferes with the efforts of

[18] It was argued by Mary M. Manderscheld, Montgomery Ward & Co., that this involves the assumption by the Administrator of a power to fix minimum wages for "executive" and "administrative" employees for which no basis is found in the act. Record April 10-16 hearing, vol. II, p. 267.

[19] It was later stated at the hearing by the Council's general counsel, J. H. Ballew, that a salary qualification of $20 to $30 a week would not be objectionable; record June 3-5 hearing, vol. I, p. 27.

[20] See Wage and Hour Division Interpretative Bulletin No. 1, par. 5.

ambitious young men to improve their status by studying their employer's business after working hours.[21] An employer may frequently consider such after-hours work of inadequate educational value to justify overtime payments. However, the normal practice throughout industry for both factory and clerical workers is to give training on the job and during working hours, and the act in no way discourages such training. While a hardship with respect to training may be produced in occasional exceptional instances, this hardship must be weighed against the general widespread improvement of working conditions which results from application of the act.

It was also stated that the overtime requirements force some employers to place their clerical employees on staggered shifts which are inconvenient to both employer and employee.[22] No doubt this has occurred in some instances, although much of the testimony on this point referred to staggered shifts as a future possibility rather than a present actuality. These inconvenient staggered shifts may or may not be put into effect and at most will be adopted by only a small percentage of employers. Again such inconvenience as may result must be balanced against widespread shortening of working hours and increased employment.[23]

Another general argument advanced to support proposals that all clerical workers be exempted is that compliance with the act may lead employers to change many of their employees from a weekly or monthly salary to a

[21] For example, see statement of A. L. M. Wiggins, American Bankers' Association, record July 9 and 10 hearing, vol. I, p. 26.

[22] For example, see statement of F. G. Addison, Securities Savings and Commercial Bank of Washington, D. C., record July 9 and 10 hearing, vol. I, p. 54.

[23] One large New York bank hired 300 additional employees to reduce hours below the statutory maximum; see address of Administrator before the Iowa Bankers' Association, Des Moines, Iowa, Sept. 11, 1940; Wage and Hour Division, G-79, p. 4.

straight hourly pay basis with the result that the employees will earn less in slack times.[24] Without underestimating the general desirability of weekly or monthly salaries which enable employees to adjust their expenditures on the basis of an assured income (so long as they remain employed), there is little advantage in salaried employment if it serves merely as a cloak for long hours of work. Further, such salaried employment may well conceal excessively low hourly rates of pay.[25] It also does not appear why there should be a reluctance to make occasional or even frequent overtime payments to salaried workers (other than those who fall into the narrower group of specifically exempted employees). Either the penalty payments will discourage long hours of work, or the worker will receive a reasonable compensation for his additional efforts. Extra payments by way of bonuses have long been common and are not considered inconsistent with salaried status. Although it is not suggested that under all circumstances the requirement of overtime payments to salaried workers is completely desirable and completely equitable, it is believed that under normal conditions the requirement is appropriate for salaried as well as for hourly paid workers. Finally, while it is reasonable to hold that the terms "bona fide executive, administrative * * * and professional capacity" are properly applicable in general only to salaried workers,[26] it does not necessarily follow that all salaried workers fall within these three categories. Even if such action were desirable, and

[24] See statement of A. L. M. Wiggins, op. cit., note 21, p. 10.

[25] It was stated by Hugh C. McKenny, Commercial Telegraphers' Union, that, as a result of the exemption from overtime payments accorded executives, employees in nonexecutive positions working the same number of hours and being paid at a lower rate will frequently surpass the executive in total compensation received. Record July 25-29 hearing, vol. IV, p. 546.

[26] As will be seen below, a requirement that pay be on a salary basis is recommended for executive employees and on a salary or fee basis for administrative and professional employees.

it is not thought to be so, the Administrator does not have the power to exempt all salaried workers.

Another argument frequently advanced by the proponents of a blanket exemption for white collar workers is that the maximum hours provisions of the act are or should be applicable only to persons whose earnings approximate the minimum wage. "A ceiling for hours" is just as much an independent objective of the act as a "floor for wages," and surely it is a serious misreading of the act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high.

LOW WAGES OF SALARIED WORKERS

All the foregoing arguments have as an inarticulate major premise the assumption that all salaried white collar workers enjoy satisfactory working conditions—that they need no protection against oppressively long hours. The record shows the incorrectness of this assumption. There is evidence, some of it introduced by proponents of the blanket exemption, that, prior to the effective date of the act, a workweek of 48 or 54 hours or even longer was common.[27] This is confirmed by the results of a survey of 4,821 women office employees in 39 States and the District of Columbia which was quoted by one witness to show that the hours of work of these employees are frequently long, 30 percent of them having a workweek of 44 to 48 hours and 10 percent having one of 48 hours or more.[28] The significance of this testimony is enhanced

[27] See, for example, statement of Joseph T. Owens, representing the Pittsburgh Plate Glass Co., record April 10-16 hearing, vol. II, p. 243; statement of Lewis Merrill, United Office and Professional Workers of America, record April 10-16 hearing, vol. II, p. 342.

[28] Women's Bureau, U.S. Department of Labor, Bulletin No. 132, Women Who Work in Offices. Quoted by Nina P. Collier, League of Women Shoppers, Inc., record April 10-16 hearing, vol. V, p. 786.

by the fact that the 1930 Census of Population showed that 1,986,830 or 49.4 percent of the total number of clerical workers were women. Moreover, there was testimony that vacations with pay are far from universal[29] and that long hours at sedentary occupations are not conducive to health.[30] Thus, the labor conditions of this group of employees have frequently been, in fact, "detrimental to health, efficiency, and general well-being." This conclusion is corroborated by the testimony of union representatives who furnished evidence of the enhanced well-being of their members caused by the shortening of their working hours. Concretely, for example, one union representative stated that the reduction of weekly hours of work had been followed by a notable decline in per capita sick benefits.[31]

The desire to have all white-collar workers exempted under section 13(a)(1) is probably also linked with a forgetfulness of the fact that section 13(a) exempts workers from both section 6 and section 7 and an unawareness of the low wages that an astonishingly large percentage of these workers have been paid. It was admitted by some employer representatives that occasionally white-collar workers receive low wages,[32] but the prevalence of low wages is best shown by surveys made by governmental agencies, State and Federal. The survey of women office

[29] Statement of Morris Zeltlin, International Federation of Architects, Engineers, Chemists, and Technicians, record July 25-29 hearing, vol. I, p. 156.

[30] Statement of Louis Merrill, United Office and Professional Workers of America, record April 10-16 hearing, vol. II, p. 340.

[31] Statement of Leo Bernstein, United Wholesale and Warehouse Employees of New York, record April 10-16 hearing, vol. V, p. 810.

[32] For example, are statement of J. H. Ballew, Southern States Industrial Council, record July 25-26 hearing, vol. I, p. 20, and statements of individual employers requesting exemption for white-collar employees with salaries ranging as low as $12 and $15 a week and $52, $55, and $57.50 a month, in Southern States Industrial Council Exhibit No. 4 (hearings branch Docket No. 55).

workers previously referred to showed that 25.4 percent of the employees covered earned less than $20.00 a week,[33] while another survey which covered both men and women office employees showed surprisingly large percentages earning less than $17.50 per week.[34]

In addition to the many statements made at the hearings by both employee and employer representatives concerning the attitude of white-collar workers toward their inclusion under the act, consideration must also be given to direct expressions from those immediately and personally affected by the proposed exemption. The Administrator has received a number of such letters. Typical among them is one from a white collar employee in North Carolina [35] who states that:

Federal labor legislation has been responsible for reducing our hours * * * from 70 and 80 a week to around

[33] Women's Bureau, op. cit., note 28.

[34] A census of office employees conducted in Pennsylvania in 1934 showed the percentage of workers in various white-collar occupations who earned less than $17.50 a week to be as follows:

	Percent
Office machine operators	52.4
Telephone and switchboard operators	68.4
File clerks	46.4
Order clerks	59.8
Office clerks	38.7
Shipping and receiving clerks	40.8
Stock clerks	47.4
Secretaries	23.3
Stenographers	51.9
Typists	62.1
Bank tellers	5.4
Bockkeepers	41.3

Pennsylvania Emergency Relief Administration, Census of Employable Workers in Urban and Rural Non Farm Areas, Pennsylvania, pp. 64 to 68.

[35] Letter dated August 25, 1940, from B. S. Dekle, found in hearings branch Docket No. 73.

42 * * * We and countless thousands of other so-called white-collar workers owe our leisure to the Wage-Hour Act. May I urge you again not to weaken it.

It is notable that although this employee obviously receives more than 40 cents an hour, he is deeply concerned with hours limitation. This is merely one individual statement out of many. The basic position is the same as that adopted by labor unions testifying on behalf of thousands of employees. To exempt these employees under section 13(a)(1) would deprive them of their right to the minimum wage required under section 6 and the overtime payments required by section 7. Their need for both should not be overlooked.

* * * *

"Weiss Report"

June 30, 1940

* * * *

"On a Salary * * * Basis"

The notice of hearing invited evidence on the need for revision or definition of the term "on a salary * * * basis." In response to this notice, a number of proposals relating to the "salary basis" requirements in the regulations were made in the course of the hearing. One of these was that the requirement of payment "on a salary * * * basis" be eliminated and that "average compensation" be used instead;[90] another, that employees be permitted to qualify for exemption even if paid an hourly wage.[91] Some witnesses suggested that the term "salary basis" be defined to mean payment of a fixed or guaranteed sum.[92] The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. Compensation on a salary basis appears to have been almost universally recognized as the only method of payment consistent with the status implied by the term "bona fide" executive.[93] Similarly, payment on a salary (or fee) basis is one of the recognized attributes of administrative and professional employment. The proposals to eliminate the requirement and to apply an hourly rate or average earnings test may therefore be rejected as inconsistent with true executive, administrative or professional status.

[90] National Association of Motor Bus Operators, transcript, p. 1792.

[91] Lennox Furnace Co., S. L. No. 9.

[92] Office Employees International Union, AFL, transcript, p. 2734; National Coal Association, transcript, p. 1473; and Central Pennsylvanie Coal Producers' Association, transcript, p. 1581.

[93] See, for example, transcript, pp. 99-100, 134-135, 399, 707, 771-772, 999-1000, 1431-1432. The argument was also made, however, that the requirement of payment on a salary basis is illegal. See Exhibit No. 15.

A number of questions have arisen in the past in connection with the interpretation of the phrase "on a salary * * * basis" particularly with respect to the effect of deductions on the salaried status of an employee. The problem became of some importance during the war when the practice of making such deductions was adopted by some companies engaged in war production as a disciplinary measure to discourage absenteeism among executive and administrative employees.[94] This practice raised serious questions as to whether any employees to whom it was applied were actually employed "on a salary * * * basis" in accordance with the provisions of the regulations. Investigation by the Divisions indicated that this changed practice had become sufficiently widespread to warrant the conclusion that the wartime industrial practice differed from the pre-war practice and that such disciplinary deductions were no longer inconsistent with payment "on a salary * * * basis." In an effort to meet the wartime problems and to clarify the meaning of the term "on a salary * * * basis" the Divisions issued a restatement of position, the pertinent portion of which follows:

> An employee will be considered to be paid on a "salary basis" within the meaning of sections 541.1, 541.2, or 541.3 of Regulations, Part 541, if under his employment agreement he regularly receives each pay period, on a weekly, biweekly, semimonthly, monthly, or annual basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked or in the quantity or quality of the work performed during the pay period. However, the fact that less than this amount is paid for a particular pay period because disciplinary deduc-

[94] Transcript, pp. 23, 1253-1254.

> tions are made for unreasonable absences would not in itself prove that the employee is not employed on a salary basis. On the other hand, since it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with respect to the time spent at work, an employee will not be regarded as being paid on a salary basis if deductions are made for those types of absences ordinarily allowed such employees. For example, an employee is not being paid on a salary basis, if the employer makes deductions from his salary for an afternoon when he goes home early or when he occasionally takes a day off, unless, under the circumstances of a particular case, such absences must be considered unreasonable.[95]

As a result of this statement of position the problems created by the peculiar wartime conditions in many plants were solved but as an incident thereof, numerous administrative difficulties were encountered. For example, employers as well as the Divisions were faced with the need for determining in particular cases whether absences were reasonable or unreasonable and whether unreasonable absences included absences for longer periods than were allowed under established company plans for sick leave and "annual" leave. Since the answer to this latter question was determined to depend upon the reasonableness of the particular leave plan, employers had to decide for themselves and the Divisions in many instances were compelled to rule on specific leave plans to determine whether the leave plans were "reasonable" in nature. Employers were thus subject to considerable uncertainty prior to obtaining the opinion of the Divisions and the Divisions were faced with an undesirable administrative burden in giving such opinions. In my opinion, moreover, the building of

[95] Release A-9 dated August 24, 1944, "Payment on 'Salary Basis' for Executive, Administrative and Professional Employees Clarified."

such an elaborate structure of interpretation upon the simple phrase "on a salary * * * basis" should be avoided if possible in the interests of good administration.

The testimony at the hearings indicated that the practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries had been a wartime phenomenon, resulting from rapid upgrading, the pressure of long hours, and other temporary conditions. Such deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary.[96] There appears to be no present need for a definition of "salary basis" as difficult to apply as the one now followed by the Divisions, particularly since it is not consistent with the common understanding of the phrase as it applies to bona fide executive, administrative, and professional employees.[97] In view of the changed conditions, payment of anything less than the full salary seems to cast doubt upon the bona fide character of the employee's executive, administrative, or professional status.

I recommend that the official explanation of the regulations [98] make it clear that the term "on a salary * * * basis" requires that the employee receive his full salary for any week in which he performs any work without regard to the number of days or hours worked.[99] This

[96] See, for example, transcript, pp. 23, 134-135, 399, 630-632, 1001, 1336-1337, 2759.

[97] Some representatives of employers urged that provision for deductions be retained. For example, see transcript, p. 1359.

[98] Later in this report the recommendation is made to issue an explanatory bulletin together with the revised regulations.

[99] This recommendation is not intended to affect the Divisions' general position under the act that payment is not required in any week in which no work is performed.

recommendation may be accomplished by defining the term in the following language:

> An employee will be considered to be paid on a salary basis within the meaning of these regulations, if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the number of hours worked in the workweek or in the quality or quantity of the work performed.

The question may be raised in connection with the above recommendation whether the proposed definition of "salary basis" in all cases excludes employment on a commission basis, hourly rate, percentage of profit, or similar methods of payment resulting in varying amounts of weekly earnings. It should be noted that the language "a predetermined amount constituting all or part of his compensation" is used in the proposed definition. It is the purpose of this phrase to make it clear that additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of $75 or more per week and, in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of his branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or the equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement will be met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that he will receive not less than the amount specified in the regulations in any week in which he performs any work.[100] The

[100] A representative of the coal industry testified that section foremen who are paid on a daily basis plus a minimum weekly guarantee enjoy all the privileges of salaried employees. Transcript, pp. 1522-1524.

test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement that the full salary must be paid in any week in which any work is performed. For example, a salary of $100 a week may not arbitrarily be divided into a guaranteed minimum of $75 paid in each week in which any work is performed, and an additional $25 which is made subject to deductions.

Failure to pay the full salary in the initial or terminal week of employment is not considered inconsistent with the salary basis of payment. In such weeks the payment of a proportionate part of the employee's salary for the time actually worked will meet the requirement. However, this should not be construed to mean that an employee is on a salary basis within the meaning of the regulations if he is employed occasionally for a few days and is paid a proportionate part of the weekly salary when so employed. Moreover, even payment of the full weekly salary under such circumstances would not meet the requirement, since casual or occasional employment for a few days at a time is inconsistent with employment on a salary basis within the meaning of the regulations.

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"Kantor Report"

March 3, 1958

* * * *

Function of the Salary Requirement

The salary tests in the definitions of executive, administrative and professional employees have been an integral part of the regulations since 1940. The terms bona fide executive, administrative and professional imply a certain prestige, status and importance, and the employee's salary serves as one mark of his status in management or the professions. It is an index of the status that sets off the bona fide executive from the working squad-leader, and distinguishes the clerk or sub-professional from one who is performing administrative or professional work. Generally speaking, salary is a good indicator of the degree of importance attached to a particular employee's job.

Essentially, the salary tests are guides to assist in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investigator as well as to employers and employees in borderline cases, and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees. Employees who do not meet the salary test are generally also found not to meet the other requirements of the regulations.

1880: DEFINING & DELIMITING THE TERM "ANY EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY" (ESA/W-H)

(May 13, 1996)

Priority: Economically Significant

Legal Authority: 29 USC 213(a)(1)

CFR Citation: 29 CFR 541

Legal Deadline: None

Abstract: These regulations set forth the criteria for exemption from the Fair Labor Standards Act's minimum wage and overtime requirements for "executive," "administrative," "professional" and "outside sales employees." To be exempt, employees must meet certain tests relating to duties and responsibilities and be paid on a salary basis at specified levels. A final rule increasing the salary test levels was published on January 13, 1981 (46 FR 3010), to become effective on February 13, 1981, but was indefinitely stayed on February 12, 1981 (46 FR 11972). On March 27, 1981, a proposal to suspend the final rule indefinitely was published (46 FR 18998), with comments due by April 28, 1981. As a result of numerous comments and petitions from industry groups on the duties and responsibilities tests, and as a result of recent case law developments, the Department concluded that a more comprehensive review of these regulations was needed. An ANPRM reopening the comment period and broadening the scope of review to include all aspects of the regulations was published on November 19, 1985, with the comment period subsequently extended to March 22, 1986.

The Department has revised these regulations since the ANPRM to address specific issues. In 1991, as the result of an amendment to the Fair Labor Standards Act (FLSA), the regulations were revised to permit certain

computer systems analysts, computer programmers, software engineers, and other similarly skilled professional employees to qualify for the exemption, including those paid on an hourly basis if their rates of pay exceed 6½ times the applicable minimum wage. Also, in 1992 the Department issued a final rule which provided, in part, that an otherwise exempt public sector employee would not be disqualified from the exemption's requirement for payment on a "salary basis" solely because the employee is paid according to a public pay and leave system that, absent the use of paid leave, requires the employee's pay to be reduced for absences of less than one workday. These revisions were limited in nature and the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors. All of these factors have led the Department to conclude that a review of these regulations is both necessary and appropriate.

Statement of Need: These regulations set forth the criteria used in the determination of the application of the FLSA exemption for "executive," "administrative," "professional," and "outside sales employees." The existing salary test levels used in determining which employees qualify as exempt from the minimum wage and overtime rules were adopted in 1975 on an interim basis. These salary level tests are outdated and offer little practical guidance in the application of the exemption. In addition, numerous comments and petitions have been received in recent years from industry groups regarding the duties and responsibilities tests in the regulatlons. These factors, as well as recent case law developments, have led the Department to conclude that a review of these regulations is needed.

These regulations have been revised in recent years to deal with specific issues. In 1991, as the result of an

amendment to the FLSA, the regulations were revised to permit certain computer systems analysts, computer programmers, software engineers, and other similarly skilled professional employees to qualify for the exemption, including those paid on an hourly basis if their rates of pay exceed 6½ times the applicable minimum wage. Also in 1991, the Department undertook separate rulemaking on another aspect of the regulations, the definition of "salary basis" for public-sector employers. This interim final rule provided, in part, that an otherwise exempt public-sector employee would not be disqualified from the exemption's requirement for payment on a "salary basis" solely because the employee is paid according to a public pay and leave system that, absent the use of paid leave, requires the employee's pay to be reduced for absences of less than one workday. In 1992, the Department issued its final rule on this matter.

Because of the limited nature of these revisions, the regulations are still in need of updating and clarification. In addition, recent court rulings have caused confusion as to what constitutes compliance with the regulation's "salary basis" criteria in both the public and private sectors.

Alternatives: The Department has met with affected interest groups in developing regulatory alternatives. Following completion of these outreach and consultation activities, full regulatory alternatives will be developed.

Although legislative proposals have been introduced in the Congress to address certain aspects of these regulations; the Department will continue to pursue revisions to the regulations as the appropriate response to the concerns raised. Alternatives likely to be considered include particular changes to address "salary basis" and salary level issues to a comprehensive overhaul of the regulations that also addresses the duties and responsibilities tests.

Anticipated Costs and Benefits: Some 23 million employees are estimated to be within the scope of these regulations. Legal developments in court cases are causing

progressive loss of control of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate this apprehension. In the public sector, State and local government employers contend that the rules are based on production workplace environments from the 1940s and 1950s, and that they do not readily adapt to contemporary government functions. The Federal government also has concerns regarding the manner in which the courts and arbitration decisions are applying the exemption to the Federal workforce. Resolution of confusion over how the regulations are to be applied in the public sector will ensure that employees are protected, that employers are able to comply with their responsibilities under the law, and that the regulations are enforceable. Preliminary estimates of the specific costs and benefits of this regulatory action will be developed once the various regulatory alternatives are identified.

Risks: This action does not affect public health, safety, or the environment.

SGT. DAY DEPOSITION

September 1, 1989

* * * *

[6] Q. Are you assigned to a particular shift?

A. I work permanent night watch.

Q. Okay. And what does that mean, night watch?

A. I report—The night watch works from eleven-ten at night to seven-ten in the morning. It's a split shift.

Q. What do you mean by a split shift?

A. Some report at ten-fifty at night and get relieved at six-fifty in the morning.

Q. Are you paid some kind of shift differential or anything for working nights?

A. Yes, sir.

Q. That's figured in your salary?

A. Yes, sir.

Q. Do you know what that differential is or how that's figured?

A. 10 percent for the hours you work.

* * * *

[7] A. Well, if you work eight hours a night you get paid for 10 percent of your eight hours. If you're off, you don't get paid that extra 10 percent.

Q. So do you have a base salary that's something less than thirty-seven thousand and one dollars or is that your base salary and you get 10 percent over and above that?

A. I get 10 percent over and above that.

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ROSALIE CORTELYOU DEPOSITION

September 1, 1989

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[6] Q. From other than department funds, are there any police—sergeants who get overtime?

A. Yes.

Q. And can you tell me in what departments these sergeants exist?

A. Which departments they're like assigned to?

Q. Yes. Well, first of all, do you have a number as to how many get paid overtime, whether it's from department funds or not from department funds?

MR. RENICK: Well, let me interject an objection here in defining what you mean by overtime. I'm not sure—

Q. (BY MR. RIVERA) Who get time and a half, who get paid for anything over forty hours.

A. We have no sergeants getting paid over forty hours for the department.

Q. But do they get paid overtime from some other source doing police work for the department?

A. I don't know exactly what you mean by that. You know, like patrol duties you mean or—funds coming to the department?

[7] Q. No. Let me rephrase the question. Perhaps it will be more clear. I understand your previous testimony to be that there are some sergeants who get paid overtime but not from department funds; is that a correct characterization?

A. That's correct.

Q. Okay. I want to know who those sergeants are and what departments they're in.

A. They would be less than a half a dozen. They might be six max. Currently there's only one that I know of.

Q. And who is that?

A. Sergeant William Conreux.

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[14] Q. Now Ms. Cortelyou, I'd like you to assume for a moment that we have a sergeant who's got no rec days, no more days off, and has used up his forty hour bank, and he decides that he wants to take two hours off. Would he be paid for those two hours?

A. Yes.

Q. Now that's if it was an excused absence, is that correct?

A. Correct.

Q. But what if it were unexcused?

A. I've never seen a case like that.

Q. But would he be docked if he took off?

MR. RENICK: Well, you're asking her to speculate. She's just said that she's never seen a case like that, so I'll object to the question, speculative.

Q. (BY MR. RIVERA) But that doesn't mean that you wouldn't know. The department doesn't take—pay people for time that they don't work when it's unexcused, is that true?

A. How would I know if it was unexcused? I wouldn't dock his pay, no. I have never docked a sergeant or lieutenant or a captain if they were absent for just a couple of hours.

Q. Well, you said you've never docked it, [15] but I just want to know if you can dock it. I'm interested in a situation where a sergeant says to his lieutenant, I want to take three hours off, and the lieutenant says, no, you can't take three hours off, I need you here. He goes home anyway.

A. That would be disciplinary then.

Q. But would he be docked for those three hours that he was absent without leave or absent without being excused?

A. Not at that point, no. He would have to—There would be an allegation of misconduct. He'd have to go through Internal Affairs, waivers would be signed or a board trial. Again, that's disciplinary. We would not dock him within an immediate time frame, you know, within the next paycheck or anything like that. We would not take time away from him, no—dollars.

Q. You would still pay him and then he'd be subject to discipline later?

A. Correct.

Q. But if the officer had overtime and he left and he said I'm leaving even though he wasn't excused—I'm

talking a sergeant—and he leaves even though he's unexcused, would they then take his four hours overtime?

[16] A. I would guess they would. Again, it's up to the discretion of his supervisor.

Q. Do you know why they would take his overtime if he's absent, the sergeant—and all my questions, by the way, will refer to sergeants unless I'm referring specifically to a patrolman—do you know why they would take away his—part of his forty hours overtime and not dock him if he's unexcused?

A. No, I wouldn't know that.

Q. You don't make that policy?

A. No, I don't.

Q. Does a police officer—I'm sorry. Does a sergeant get holiday pay and rec time?

A. Yes.

Q. And is that measured in hour increments or is it measured in day increments?

A. It's so many days converted to hours.

Q. So would it show up on your computer in hours?

A. Yes.

Q. So if the officer wanted to take rec time he can take it less than a day, he can leave at noon and just take the rest of it as rec time?

A. I don't believe that's true. I don't [17] know what the policy is at the district level.

Q. Okay. But you compute the bank in hours and not in days?

A. Correct.

Q. So that one day would be eight hours, and if he had five days of rec time he would have forty hours and that's how it's listed?

A. Correct.

Q. Do you compute vacation in terms of hours?

A. Yes.

Q. Somebody wanting to know how much time they had, vacation time, you would say they had forty hours as opened to five days?

A. Correct.

Q. Now the shift differential, when does that apply to a sergeant?

A. It's any full hour that they work between eleven at night and seven in the morning.

Q. So that too is measured in hour increments?

A. Per statute, yes.

Q. Which statute, state statute or Federal?

A. State statute.

Q. And what is that increment?

A. It's 10 percent.

[18] Q. So let's say somehow a sergeant is working and he gets carried over, he's supposed to stop at eleven but he ends up working till one o'clock the next morning, would he then get a shift differential for those two hours that carried over to—between, say, eleven and one o'clock in the morning?

A. Yes, he would.

Q. Then a sergeant who's scheduled to work from ten or six to two will only get the shift differential from eleven o'clock to two in the morning?

A. Correct.

Q. Is there anything else that you measure in hour increments, any other benefits or compensation other than just the wages, you told me hours, vacation—what about sick time? Is that measured in hour increments too?

A. Yes.

* * * *

[29] Q. Now, if that sergeant is working nights, eleven to seven, and has this excused absence, do you [30] pay him his regular pay or do you pay him the shift differential too?

A. I would not pay shift differential because the statute says for each hour worked he will get his eight hour base pay, but not the 10 percent on top of it.

Q. Statute also says that he gets his base pay for each hour worked, doesn't it?

A. He is getting his base pay, yes.

Q. For each hour worked?

A. No, I don't think it says that. It says eighty hours shall constitute—forty hours shall constitute a week.

Q. But you're paying him—the nonshift differential man, you're paying him even though he hasn't worked those forty hours?

A. Say that again, sir.

Q. The man who's not on shift differential working days gets off eight hours for this emergency. You're paying him—

A. —Correct.

Q. —the same rate?

A. Right.

Q. The man on shift differential that has the same excused absence, you're paying him but just [31] straight time, not his shift differential?

A. Correct. I'm paying them both the same way.

Q. Where is the sergeants' overtime records kept? Who keeps those? What I mean, how much he has left from the time he got promoted to sergeant. Who would have that information?

A. It's maintained in the computer. But there are records at the district for thirteen months and I'm sure each officer has a copy of his own records.

Q. But you don't have it in your department?

A. I have blue slips of time taken and time earned going back maybe ten years.

Q. There's no time earned on a sergeant though?

A. No, prior when he was a police officer.

Q. So you do have that record in your department?

A. Yes.

Q. Time that he earned and accumulated prior to becoming a sergeant?

A. Yes, sir.

Q. And then you also have the time that he used since becoming a sergeant?

[32] A. Correct.

Q. So then you have a balance on hand, so to speak?

A. Yes.

Q. Mr. Rivera asked you about the sergeant who would take unexcused time off, and I believe you said he would be disciplined, is that correct; you would not dock him in pay, he would be disciplined?

A. Based on his assumption that the officer just took off without authorization, yes, it would be disciplinary.

Q. It would be disciplinary? And then you also said that you would not deduct anything current from his pay during that pay period?

A. That's correct.

Q. Let me give you a hypothetical question. A sergeant misses a day of work, just flat out misses. In his next paycheck there's going to be no deduction for the eight hours missed, is that correct?

A. That's correct.

Q. He gets disciplined and let's say he's suspended for two days because of that infraction. What happens to his subsequent pay?

A. He would lose two days pay.

Q. Would he still be paid for the day he [33] didn't work?

A. If that was—It would depend if that was part of the discipline that was handed down. They may say your punishment is two days plus the day you were not here. It's all hypothetical.

Q. So has that happened?

A. Not to my knowledge. I think they incorporate that in the disciplinary action.

Q. So you think that he's deducted for the time he actually missed by reason of the disciplinary action?

A. I really don't know. I should not even be addressing that.

Q. But to your knowledge, you don't pay him for the time he missed, do you?

A. If I don't know what the end results is, I don't know—I mean, I know I am docking someone for disciplinary action, but I don't know what the result of that is, you know, if it includes that day or not. That would be a matter for Internal Affairs.

Q. Have you ever seen a person disciplined and be docked for less time than he actually missed?

A. I don't recall offhand. I couldn't address that honestly.

Q. Well, wouldn't that strike you—if that [34] had happened, don't you think you'd remember?

A. No.

Q. You don't? Do you have the records that you could find the answer to that question?

A. For a specific individual I could, yes.

Q. But I mean just a search of your records, wouldn't it show up if a man was disciplined and given two days without pay? Would your records show how much time he had actually missed for that disciplinary action?

A. Yes, it would show that.

Q. So you could balance those out?

A. Yes.

Q. What happens to a sergeant when he's sick and he takes sick time? Does he have a bank, so to speak, of sick time?

A. Yes, they do.

Q. And if he gets ill on the job he will be charged with, let's say, four hours or sick time, is that correct?

A. He could or couldn't be charged. Again, it's up to the commander, watch commander, or captain.

Q. What I'm trying to get at—Mr. Rivera sort of covered this—you do measure sick time in hours?

[35] A. Correct.

Q. How many hours does a sergeant get per year of sick time?

A. All police personnel get twelve—they get eight hours per month. They earn at eight hours per month, one day per month.

Q. Of—

A. —so it would be twelve.

Q. Times eight, whatever that is?

A. Yes, ninety-six.

Q. In hours?

A. Yes.

Q. If a sergeant had, let's say, a serious illness and used up all of his sick time and then a month later suffered an injury and had to take additional sick time, what if any adjustment would you make? He has no more sick time and he's sick.

A. They have the option of applying for a furlough with pay.

Q. That's one option?

A. That's the procedure. Yes.

Q. He applies for a furlough with pay?

A. Or a furlough without pay.

Q. Suppose it is an emergency thing, that he has some type of an attack and he can't apply for a [36] furlough with pay, what would happen in that situation, or would he apply for it retroactively?

A. It would be automatic, he would apply for a furlough with or without pay. That is the department procedure.

Q. And then if he's granted the furlough with pay he continues on his regular pay?

A. Correct.

Q. And without pay, then he gets nothing?

A. Correct.

Q. When a sergeant has unexcused absence, unexcused absence, you—I think you said previously you do get some notice of that, either on the duty roster or in some form; you get a notice of that?

A. On the duty roster if they are excused by their commander it will be noted.

Q. But if it's unexcused—

A. —Then there will be an audit form or an allegation of misconduct.

Q. What was the first thing you said, a what form?

A. Administrative report and transmittal.

Q. And what information does that contain?

A. That would be a report written by their commender through the chain of command stating that [37] some-

one missed work, didn't show up for work, left early without authorization, came in late without authorization.

Q. And is that—Is that report transmitted immediately upon the occurrence of the event or is it some time before it filters down to you?

A. Someone is able—Again, talking of sergeants or any rank, we would—we are to get an advance copy or we are to get a copy of those reports and then AWOL's, a memo has to be submitted to our office.

Q. In the case of a patrolman, would you dock him immediately, charge him with time?

A. Yes.

Q. His next paycheck is going to show that he was AWOL?

A. Yes.

Q. And the sergeant you don't?

A. No.

Q. Now are you sure of this, that you treat those two situations different?

A. I don't remember ever seeing an AWOL on a sergeant so—

Q. They're all good guys, huh? If you don't remember—I'm not trying to confuse you. If you [38] don't remember—

A. —No, I'm not confused, but I'm just—it just doesn't happen.

Q. Or at least it isn't reported to you?

A. It's not reported to us.

Q. But you do get AWOL reports on patrolmen within twenty-four hours of the time it happens?

A. Yes.

Q. And in your twenty-four years you've never seen one on a sergeant?

A. I can't recall one, no.

Q. On a sergeant the first time you see one would be in a disciplinary proceeding?

A. That's correct.

Q. You'd get some kind of a notification that Sergeant Jones has been docked two days pay?

A. Correct.

Q. A few minutes ago you told me that you could search your records and determine if Sergeant Jones was docked two days pay, how such time Sergeant Jones had actually missed from duty to be docked that two days pay?

A. That's correct.

Q. And I'm not trying to confuse you. You still stick with that answer?

[39] A. Yes.

Q. You would have something?

A. Yes.

Q. In light of not getting an AWOL report on the sergeant?

A. It would be a suspension, probably a disciplinary action from the board.

Q. Yes, but would you have a record as to how much time the sergeant had actually missed to cause that?

A. Yes. If the duty roster were marked correctly, yes.

Q. Okay. Do you get or—Cross that.

There's a departmental regulation now, I think it came in August of 1988, which says in addition to marking the duty roster the commanding officer or watch commander must submit a memo to the area sergeant or the area major or whatever on all excused absences. Are you familiar with that regulation?

A. That may be a bureau order. We do not maintain the records on that.

Q. Do you get a copy of the memo—

A. —No.

Q. —that the captain of the Eighth [40] District would submit when he excused Sergeant Jones for a half a day to go to his neighbor's funeral or something?

A. No, we do not get those.

Q. Would it show on your duty roster that Jones missed four hours for some reason?

A. Yes.

Q. That would show—

A. —That's why they're writing the memo.

Q. Pardon?

A. That's why they're writing the memo.

Q. I know that. But that shows on your duty roster? You just disregard it as far as pay goes?

A. The commander has the discretion to do that.

Q. Yes, I understand that, but I mean, you disregard that for pay purposes?

A. Correct.

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ROBERT SCHEETZ DEPOSITION

October 4, 1989

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[11] Q. Do you recall this and was there a period in '86 when—when—I get the implication from the memo that there was a change that before that records weren't kept and then records started to be kept; is that right?

A. If my memory serves me correctly, this was prompted by the president of the Board of Police Commisioners asking me if we could determine how many extra hours our management personnel put in, you know.

Q. Okay.

A. And I—They're supposed to write in the duty ledger, you know, when they do—they're doing duties other than the ones they're assigned to; for instance, if they're—if they're in court, that type of thing.

Q. Right.

A. But I couldn't say that we were keeping the records, so I issued a memorandum that they should do this and maintain it and put a log in the district station so that we could check periodically [12] and see that they are maintained.

Q. Then would the procedure be that after—if not before but at least after this memo, or after this memo plus some time to get it put into effect, that sergeants and lieutenants working in the department, their work time should be kept in an hourly record, records should be kept of their time they're spending working for the department?

A. Well, you know, we had to keep track of the time whether it was by the hours or was by what I don't know, but, for instance, we had—if we had a sergeant who was detached, for instance, to another unit, they would mark on the duty roster detached there and if indeed there was extra duties that they were performing there they were responsible for logging it.

* * * *

[29] Q. And am I right in understanding that if you had a sergeant and he had eight persons or nine persons in that situation, some of those people [30] because they make overtime would make more than the sergeant?

A. I would say that's a fair statement.

Q. Okay.

A. Now, the—I think our ninth year patrolman makes close to thirty-one thousand, you know, so—

Q. So if you add a nine- or ten-year patrolman who had overtime, they would most likely make more than the sergeants they were working with?

A. I think we have steps in the sergeant grade, so they would probably make more than the first year sergeant.

Q. Okay. If a sergeant is absent—a sergeant could be absent without leave, I assume?

A. Oh, yes.

Q. And what would happen to a sergeant if he was absent without leave?

A. He would be subject to charges.

Q. And as a result of the charges could he be docked pay?

A. I would say that he'd probably be—he could be—he could be suspended in lieu of—say maybe one day suspension, two day suspension. I don't recall that we've ever docked anybody, you know, [31] like you're docked ten dollars or somehting like that. I don't think—I don't recall in my time in the department that that ever happened.

Q. If the sergeants generally understood that if they were—if their shift ran from eight to five, which it probably wouldn't, but if the shift ran from eight to five if the sergeant understood that he was supposed to be there, and if their understanding was that it was a department policy if they didn't come in without an excuse for four hours that they wouldn't be entitled to pay for that four hours, would they be wrong, they should be paid even if they don't come to work?

MR. RENICK: I'm going to object to the question if you're asking him what he thinks some sergeant's who's unidentified understanding might be. I don't think that's a proper question.

Q. (BY MR. LEIBIG) If a sergeant had the understanding that if they just took four hours to go to a ball game without ~~an ex~~excuse that they would expect not to be paid for that time, would they be incorrect? Would they be entitled to be paid for the time even though they didn't come to work?

MR. RENICK: I thing it's two different questions. I object to the form.

[32] Q. (BY MR. LEIBIG) I ask the second question.

A. I think that a sergeant that was supposed to be at work at eight o'clock and didn't come in until twelve knows he would be subject to disciplinary procedures, and, again, what form that would take would be up to the Board.

Q. Of course. And would the disciplinary procedures —The disciplinary procedure would be based on the fact that the sergeant was AWOL, right?

A. (Indicating).

MR. RENICK: You have to answer verbally so that she can put it down.

Q. (BY MR. LEIBIG) Is that right?

A. Yes.

Q. And in order to sustain that charge the department would not have to prove a safety violation; is that right? In order to sustain such a charge of AWOL would the department have to prove that a safety violation had occurred?

A. I don't understand safety violation.

Q. Is the reason that you would be disciplined if you were AWOL because it would cause a safety violation? I assume the answer is no. The reason you would be disciplined for being AWOL is [33] because you weren't there when people thought you should be there, correct?

A. Right.

Q. There isn't another reason for it? Well, I don't mean to be mysterious. There's some regulation in the Fair Labor Standards Act that says discipline for safety violations falls in another category than other forms of discipline. It isn't under the regulation that provides that you can be disciplined for a safety violation, it's under a specific regulation for AWOL, correct?

A. We believe—Well, I'd say correct, yeah.

Q. And just for the record, in the police manual for St. Louis there's a list of disciplinary violations, I think it's—and one of the—Let me find it so I can show it to you so you can be clear. And one of the violations is 7.004C and it says absent from duty without leave, and that's what a person would be—a sergeant could be charged with?

A. Right.

Q. Just so there's no doubt. Now, if a sergeant or a lieutenant didn't come to work—I got to back up from that.

I understand that when a sergeant is first promoted to sergeant he will often have forty [34] hours compensatory

time or overtime on the books that he earned prior to becoming a sergeant; am I right in that?

A. Yes.

Q. And if one of those sergeants takes this four hours off to go to his kid's ball game or something, am I right that if he had any of the time it would be charged against that, that bank would be reduced until it was gone?

A. I think those cases would be handled on a case by case—you know, some lieutenants would handle it one way and some would handle it another, you know. I think that if they had overtime and they were aware that they did have the overtime they may well take it that way, but I don't think they would have to take it that way.

Q. But it is probably appropriate if the sergeant said I'm going to take off part of a day today because my wife has to go to the dentist and I need to drive her, the lieutenant would say okay, go ahead, but I'm going to take two hours out of your bank if the guy still has got forty hours in his bank?

A. I think they carry that over when they get promoted so they don't lose it.

* * * *

[40] Q. Okay. Do you know if a sergeant has ever been disciplined for AWOL say in the recent past, in the last three or four years?

A. I can't recall any specific case, but I would say yes.

Q. And do you know—you may not know, but do you know of any sergeant who's ever been disciplined for missing work and the discipline included some loss of pay? I mean, everybody who missed work, when they get discipline am I right that most of the time when they're disciplined includes some loss of pay? I mean, they didn't come to work, I would assume that.

A. There's a chance that they would. I don't recall it.

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RAY BURGDORF DEPOSITION

October 4, 1989

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[49] Q. (BY MR. RIVERA) Did you have forty hours comp time accumulated when you became sergeant?

A. Yes, I did.

Q. And while you were sergeant did you use any of that comp time?

A. I used every bit of it.

Q. What would you use it for?

A. An extra day off, some special event would come up, wedding, things of that nature.

Q. If you wanted to take say less than a day off for something personal, would you be required to use four hours of comp time if you wanted to leave four hours early?

A. If I had the four hours, yes.

Q. And were you required to use that comp time before you would be excused?

A. Yes.

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LARRY PATTISON DEPOSITION

October 4, 1989

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[13] Q. If you want me to go through one—Okay. Is sergeants' pay subject to deduction if they miss part of a day?

A. No.

Q. If a sergeant misses part of a day without an excuse and is AWOL—

A. Uh-huh.

Q. —may the sergeant be disciplined?

A. Yes.

Q. May the discipline include the docking of pay?

A. The discipline could include suspension for a particular number of days, which would be loss of pay for that day.

Q. So during that pay period their pay would be reduced for that pay period by that day that they were suspended?

A. Yes.

Q. Could a sergeant who was absent without leave who had compensatory time on the books from his pre-sergeant lose some of that time if they [14] were AWOL for part of a day and they had the time on the books?

A. Now, no, you cannot—you no longer do that in the police department.

Q. When did that change?

A. I am not sure.

Q. What would happen—Suppose a sergeant is assigned to a precinct, it's eight o'clock in the morning, he's supposed to report to work.

A. Uh-huh.

Q. And he doesn't report until noon.

A. Uh-huh.

Q. Would—And he has twenty hours comp time on his record.

A. Uh-huh.

Q. Would he be dock—Would he be—Could he use that comp time toward those four hours he was late?

A. I don't believe so under those circumstances. He could use the time if he requested to be off.

Q. No, but he didn't request to be off.

A. No, there would be an investigation/allegation made against him if he didn't report for duty on time.

[15] Q. Okay. Are sergeants required when they're absent to use up their overtime banks, then their leave time, and then their sick time if they're absent for a period of time?

A. What reason would they be absent for?

Q. They went to a baseball game with their son, for example.

A. If they requested to be off to do that?

Q. Well, does it—if it makes a difference—

A. —Certainly.

Q. Yes, if they requested to be off.

A. Yes, he would have to use what time he had coming, right.

Q. Even if it was part of a day, even if he was only out half a day, he would still have to use some of that time, correct?

A. (Indicating).

Q. What if he didn't ask to be off?

A. If he didn't ask to be off then there would have to be an allegation started against him with disciplinary procedures implemented.

Q. And a supervisor wouldn't have the authority to take some of his leave and attribute that to the time unless he asked in advance?

A. There's nothing in writing that says he [16] can do that.

Q. Is there anything in writing that says he can't?

A. Only thing in writing that says if you do not report for duty on time an investigation will be made to determine your whereabouts and if the—if—you know, if it's not an accident, something like that, that keeps you from coming in, being at the hospital, then you bring an allegation against the individual.

Q. All right. So it is—And with regard to the sergeants, if a sergeant's shift is from eight to four, and that wouldn't be a regular shift but assume that is a shift.

A. Uh-huh.

Q. And a sergeant is required to be there from eight to four and can't unilaterally absent himself for part of that shift without being in trouble for being AWOL.

A. Correct.

Q. If he did absent himself for part of it and had a hearing and it was proved that he did, he would be found to be absent without leave?

A. There would be an investigation to find out why, correct.

[17] Q. And there's no basis to automatically excuse that because he's salaried?

A. Correct.

Q. Now, do—do—would the same be true of lieutenants?

A. Yes.

* * * *

TRIAL TRANSCRIPT VOLUME I

September 15, 1993

The Court

[40] MR. RENICK: Which I raised yesterday and I don't know whether you want to address this or whether you've had time to consider it and that is the affect of your ruling on October 31, 1991, with respect to the salary test. Our position is that based on your ruling, the salary test for the remaining Plaintiffs is no longer an issue but we need to,—I think we need to clarify that,—

THE COURT: On the record.

MR. RENICK: in order to know whether I'm going to present evidence on that issue.

THE COURT: Alright, the *FSLA* fixes two hundred and fifty dollars ($250.00) a week as the boundary, as I remembered. Is that correct, then? And your contention is there is no Sergeant who makes less than two fifty a week.

MR. RENICK: Well, that's a seperate issue, your Honor. Plaintiffs have stipulated that every Sergeant makes more than two hundred fifty dollars ($250.00) per week.

THE COURT: Alright.

MR. RENICK: There was, and perhaps we can put this off till later too as well, to give the Court time to review the ruling from October, 1991, but the question was,—dealt with things like whether they were having,—being subject to deductions for partial day absences,—

THE COURT: Oh, that's right, that was the ques-[41] tion, —

MR. RENICK: And those issues, you ruled quite clearly that Lieutenant Delgado and Plaintiffs made all the arguments with respect to Delgado and you rejected those arguments and found that Lieutenant Delgado specifically was paid on a salary basis, within the meaning of the *FLSA*. The Sergeants in that portion of your

ruling, then you went on to address Sergeants and you said, the Court believes the only remaining issue for trial with respect to Sergeants is this issue whether or not management is a primary duty which we have always understood to mean that your ruling with respect to salary basis was the same for Sergeants as it was for Lieutenant Delgado. If that's not the case, then we need,—

THE COURT: That is the case. That's what I intended to do.

MR. LIEBIG: Just very briefly on that point, and maybe we can cover it in argument, but,—so you know our position on the point.

THE COURT: Alright.

MR. LIEBIG: The, your ruling was made in October of 1991.

THE COURT: Right.

MR. LIEBIG: And early in September of 1991 the regulations applicable to the salary tests were amended by [42] the *Fair Labor Standards Act* part of the Department of Labor in order to reflect more clearly the special problems in the public sector. Those amendments and their preamble added to the law and the clarity of how the salary test works. In many ways to the advantage of the City of St. Louis and in support of some of the points made in your decision. However, they also clarified some other parts of the salary test which we think are particularly applicable to the Sergeants in this case and secondly, your decision includes in it, and you can review it, says that this point, there has been no evidence that deductions that would be not allowed under the regulations have been made, we think the salary test remains in the case of a very limited part with regard to Sergeants is a very specific issue we want to raise which I can cover in argument but it's not extremely complicated and we can go through the regulations,—

THE COURT: Alright, well I think we can hear that when we hear the evidence and it's pertinent to that time. There was some argument about whether or not Sergeants

would be,—that there'd be penalties assessed against them, deduction for failing to report to work or some allowance not made for court time, things of that kind. I don't think that that is likely to be paramount in our decisions here. Seems to me that's a minor point. [43] Those are all guidelines that have been contained in various statutes and various rulings by different courts throughout the country as examples of, and that's all they really are, and I think there could be differences of opinion and the totality of the circumstance has to be decided by the hearing judge rather than citations from various cases wherein in one city a Sergeant was docked because he came to work late or things of that kind. I think they're all examples and they're not rules that we are bound by. They're just examples, indications of whether the parties are exempt and whether the salaries are standard. Alright, we'll take it as the trial proceeds. Okay. I think that's enough. * * *

* * * *

September 15, 1993

Testimony of Kurt Delabar

[90] Q Alright. Now, does the Board of Police Commissioners have the authority to set pay rates for officers of this particular police department?

A No sir.

Q Alright. How are the,—

MR. RENICK: And we have stipulated that, Exhibit C, your Honor, is a compilation of the salary matrix over the period of time here.

[91] BY MR. RENICK:

Q How are those salaries determined, Mr. Delabar?

A Salaries are determined by state statute. By Missouri State Statute.

Q You mean by the State Legislature?

A State Legislature, yes sir.

Q Makes the decision? Do you know any more about the process than that? About how the salaries are set?

A Once the salaries are,—once the state statute is passed by the legislature, the City of St. Louis, then will review that and has the authority to pay salaries based on within, what the statute says. The Board of Alderman.

THE COURT: Let me interrupt you for a moment. Does the City have the authority not to pay? Can they say, "I'm not going to pay the salary provided by the state statutes?"

THE WITNESS: The state statutes read that they will be paid up to a certain amount so they can,—the City can turn around and give no raise, yes sir.

THE COURT: I didn't ask about raises. I mean, if the salary's fixed for probationary patrolmen at Twenty-four thousand dollars ($24,000.00), can the City say, "I'll only pay nineteen thousand ($19,00.00)." ?

THE WITNESS: That, I don't know.

BY MR. RENICK:

[92] Q Well, the statute, I think, as you said, sets a maximum salary, correct?

A Yes sir.

* * * *

[130] Q In looking, and I'll explain it to you, in looking at sub-section (3) of the code, by the way, for the witness, what this code does is have the salary code as you testified and so forth, it sets it out. I notice in part (b) it says, in the last sentence of number three which is on the second page in the exhibit, it says,

> "No additional compensation or compensatory time off for overtime, court time, or standby court time shall be paid or allowed any officer in the rank of Sergeant or above."

Now, if it seems to be a state code provision that says the City of St. Louis and the St. Louis Police Department couldn't pay overtime pay to Sergeants, are you familiar with that?

A Not completely, but I mean, I believe that's what it says.

Q. Okay. Now, the reason I wanted to point out that, is that isn't it true that the City of St. Louis at times does pay overtime pay to police Sergeants? Aren't some police Sergeants at time paid overtime pay?

[131] A Not to my knowledge.

Q During your deposition, didn't you testify that during the flood police Sergeants that were ordered to work overtime were paid for overtime at the straight time rates above their pay salary?

A They were paid for time but I don't know that it was,—that was not overtime as far as I know.

Q It was time outside their regular hours and they received extra compensation above the state statutory level at straight time, didn't they?

MR. RENICK: I think there's no foundation for this. There's compensation above the authorized levels within the state's statutes. There's no proof of that.

MR. LIEBIG: I know, that's why I'm asking questions about it but there will be.

BY MR. LIEBIG:

Q Didn't you testify during your deposition that during the flood, special procedure was established and issued under an order that Sergeants who did work that time would be paid, above their normal compensation at straight time for during the flood?

A They were paid a bonus for working that above their,—the base pay, yes sir.

Q Okay. So they worked hours, I understand you don't want to call it overtime, but when they worked hours out- [132] side their regular scheduled work, extra hours, they received extra compensation for it during the flood by order of the department and the Police Board?

A When they worked during the flood detail, yes sir.

Q Alright. Now, are there any other occasions when police Sergeants by the St. Louis Police Department are

paid above the salary in the state code that you know of? If you want me to give you some examples or questions aren't too specific,—

MR. RENICK: Well, I object because there's no foundation that any Sergeant has ever been paid above the state code. No evidence.

MR. LIEBIG: Okay. Were any of this,—

THE COURT: Alright, go ahead. I'll overrule it, yes. I'll overrule the objection.

BY MR. LIEBIG:

Q Okay. Have there been occasions when police Sergeants have been paid overtime at time and a half? If you're not aware, say,—

A Again, not to my knowledge.

Q Okay. When,—the City also designated Chief Schuetz as a witness and in his deposition, he testified that for a time, the Sergeant assigned to the Armory was paid overtime at time and a half. As you aware of that?

A No sir.

* * * *

[138] Q Okay. And I'll ask you again, just because I want to make sure it's clear before you leave the stand, you were asked about setting rates of pay and you testified that the statute sets the rates for the pay and then you were asked, "Did anybody in the department,—did the department ever,—did anybody have the authority to set rates of pay or adjust rates of pay other than the State Legislature?" And I think you said, "No". Are you sure there aren't incidents, for instance, during the flood and in other places, where the police board has acted to adjust or change rates of pay without going to the State Legislature?

A Not to my knowledge.

Q Again, I just want to make sure, during your deposition, didn't you review an action by the police board that approved overtime as straight time being paid to the people that worked extra hours during the flood? I asked

you about that during your deposition and you explained it to me. Do you remember that?

A Well, they,—during the flood there was an additional, there was basically an additional bare bonus for individuals working the flood, yes sir.

Q Okay. And that is, that was additional pay set by the police board that wasn't called for in the State Legislative, correct?

A Yes sir.

[139] Q Okay. And just for the record, that was an action taken by the police board on,—I'll show it to you because I've only got one copy so I'm going to bring it up and show it to you,—on August 12th, 1993 the police board specifically passed the necessary action to do that, am I right? Have a look at it? I'll show it to you.

A (No verbal response)

Q This is from your deposition and you testified about it during your deposition, and didn't the police board refer to the extra time as flood overtime and approve overtime to be paid to Sergeants who worked those extra hours during the flood?

A Yes sir, I'm sorry, that's correct.

* * * *

[143] THE COURT: Alright. Let me see if I can clear up one point that maybe there's a simple explanation for and maybe there's not. When there was testimony here and you admitted that there was testimony when there was flood overtime allowed to certain officers who worked during the recent river floods, and that gave additional monies over and above the amounts in the statutes, was,—

MR. RENICK: No sir, your Honor, that's my point. There's been no testimony ever that the flood overtime is payments increased anyone's pay over and above the amounts offered up by statute. There's no evidence of that.

THE COURT: Well there's clearly evidence that additional monies were paid to them. In other words, if

they were getting three hundred dollars ($300.00) a week regularly and tney worked overtime, they got four hundred dollars ($400.00) a week or three hundred and fifty. Something. Now, so they did get some extra money during that weekly period and seems to me that maybe an explanation is or was that additional monies were coming to the City because of the regulations of the Federal authorities [144] and so on that additional money is the money that was used or was planned to be used by the police board to pay this extra money. And that same thing would be true for some of the Federal operations. The DEA may have additional monies that they can give to the police department for helping them. If that's the case, then I'd understand it. If you tell me that you're spending additional money over and above what the statute allowed, then I don't know whether there'd be any authority for that nor any requirement of the City of St. Louis to pay the money. Seems to me that the State is required to pay the money according to the statute. The statute fixes the amount and the City must pay the amount that is, up to the maximum amount. Now, there may be another explanation. There may be some people,—there may be some instances where the maximum amounts are not paid. It seems to me, the City is not required to pay the maximum amount to a Sergeant. They may pay lesser amounts and accumulate some extra money. Otherwise, I do think there are problems concerning the,—clarify what happened.

MR. LIEBIG: Your Honor. Your Honor, the only reason for the line of questioning at this point and I think there could be argument later about all sorts of things and there may be a lot of explanations of this, and I think the ones you just gave all in some, one way or [145] another apply to the situation. The only reason I asked the question, is I was responding to the questions done in direct about, he said, "Is the pay rate set by the State Legislature?" And the answers gave the idea that under the state legislative thing, there's nothing the police department could do with regard to setting pay rates and adjusting rates and all I was trying to get at is there are

some situations where they can do something. Those are situations where they get extra money or when the person is not at the maximum, there's flexibility that they could do it and so that, I was only cross examining on this point that the department has no role whatever in setting rates of pay or adjusting pay rates. They obviously do and they have used it.

THE COURT: In some instances they may have extra monies that they can use to pay extra monies and it seems to me that's pretty clear. Either the money they haven't used it all because there's been an absence or vacancy in the positions or someone is paid less than the maximum amounts and so on, every agency that I've ever seen or been associated with and I have had some experience with some, has that situation where extra money comes because of some other governmental operation or because a vacancy occurs and is not filled for three or four months and accumulated money builds up and somebody makes the decision, "Well, [146] we've got extra money here. We can pay this guy because we didn't use it last month." That explains that part of it. Now, if your only point is trying to show that the state authorizes the amount and the police board cannot change it, then of course, that is clear. Once the state fixes the statute, I don't think the statutory amount can require the City to pay more. If they're going to pay more, they've got to get it from some other source.

MR. LIEBIG: My only point was, and I think the reason the questions on direct were asked, I'm talking about relevancy now, has to do with the fact that the *FSLA* regulations in describing management have one of a list of things, the role of various people in setting rates of pay. I think the reason he was asked the direction on direct is to try to establish that not only do the Sergeants not have any role in establishing rates of pay but that nobody in the police department does and I just wanted to point out that there are people in the police department that do play a role in it and they're not Sergeants.

* * * *

TRIAL TRANSCRIPT VOLUME II

September 16, 1993

Testimony of Lt. James Scego

[141] Q And do you know whether they're ever paid additional funds for working overtime?

A No, they're not.

Q Okay. Do you know, do you recall recently there was some extra, there was a policy on extra work because of the flood relief?

A Correct.

Q Do you know if any of them worked?

A All three of them.

Q And did,—

A I'm sorry, two out of three.

Q Okay, and do you know whether they were paid straight time, overtime for that?

A They were paid straight time.

Q Straight time but extra time above their normal.

A Right, paid for the hours they put in.

Q If, are the Sergeants who work under you subject to discipline?

A Yes.

Q And I'm not, I realize none of these probably ever did this so hypothetically, if a Sergeant were for instance, insubordinate, they could be disciplined under the general orders or a manual, correct?

A Under that scenario, yes, they could be.

Q And could the discipline that they received include a [142] suspension for a day or two? It would have to be approved through the procedure, I understand.

A Sure, but it could be longer than a day or two or it could be much less.

* * * *

September 16, 1993

Testimony of Captain Roy Joachimstaler

* * * *

[182] * * * If they worked during the flood problems, of course, there's going to be some reimbursement to the State for certain flood activities that they did. Is that what you mean when you said some, on occasion, there is some occasions when Sergeants were paid additional monies?

THE WITNESS: I don't believe I testified to that, your Honor, about being paid additional monies. The only, I didn't testify to that. I can see where the only time a Sergeant is paid any additional than his salary, would be on shift differential that I'm aware of.

* * * *

September 16, 1993

Testimony of Captain Jack Titone

[205] Q Anyway, the Homicide Lieutenant, of a Sergeant, excuse me. A Homicide Sergeant obviously will work outside the normal eight hour day, from what you've already said, correct?

A That's Correct.

Q Do you use a system where at times when they work excess hours, they get the equivalent of comp time where they take some time off in exchange for having worked extra [206] hours?

A If a Sergeant, if a team was called out say at four o'clock in the morning, 4:01, if that case was over after eight hours, after being at work, we would excuse them.

Q Okay, and so that in fact, there's a practice in Homicide right now, you use, you and the Sergeant, you and the Lieutenant and the Sergeants together are able to use a system of compensatory time and manage that and take care of it is one of the things you have to work on, is that right?

MR. RENICK: I'm going to object to unless we define what compensatory time means.

MR. LIEBIG: I mean by compensatory time, that when people are,—

MR RENICK: What compensatory time means, to me means you get extra time more than that you worked. Maybe that's not the time you're,—

THE COURT: And may not,—

BY MR. LIEBIG:

Q Alright, I'll be glad to see what he means. Do you mean, that if,—you mean,—I think you meant, I think you and I were talking about the same thing. Somebody has to work twelve hour days and the next day he might have to come in and only work four hours and as long as that's approved then he may.

[207] A If a call would come out at 4:01 we, after their eight hours was completed which would have been twelve o'clock, if that assignment was done, the Sergeant would go home because he put in his eight hours.

Q Right. And so all I wanted to get is that it's sort of an administrative thing that I wanted to get in the record. That kind of administrative of the division to take care of extra hours has been used in the past and while it's obviously and administrative problem, you're able to deal with it and work with it.

A Yes, we were flexible enough to change their work hours relative to the case assignment.

MR LIEBIG: Okay. I don't have anything.

* * * *

September 16, 1993

Trial Testimony of Lt. Antoinette Filla

[230] Q If that Sergeant works overtime, does he get paid time and a half?

A No.

Q Does he ever work, does he get paid at all if he works overtime? Extra?

A He can work on the grant program and get paid overtime but that doesn't have anything to do with the police department.

Q Well, I understand that, but if he's working overtime on the grant, he does get paid overtime?

A Through the grant funds, yes.

Q Are the grant funds from the Federal Government?

A Yes.

Q If you know, and you may not, I would understand that, do you know why he gets paid overtime when he's working as a Sergeant under the grant funds from the Federal Government not when he's working for the City, do you know? Just the terms of the grant?

A That's how the grant's set up.

* * * *

[237] THE COURT: I just want to clear up one question that I have in general. When the term "overtime" is used in the Federal Grant concerning this carrier activity, you mean "overtime", you mean those officers who work during that time are paid time and a half or double time, they don't just, they're not just paid at the regular rate but they're paid at some premium rate?

THE WITNESS: Sometimes.

THE COURT: Sometimes.

THE WITNESS: The four officers that are assigned to Motor Carrier Safety Assistance, they work that all the time. Just commercial vehicles. Now the police department pays for some of it and then the Federal Government picks up some of it and the only time they work overtime is after they've put in their eight hours.

[238] THE COURT: Yes.

THE WITNESS: If they spend another four hours then it's overtime.

THE COURT: And at that time, overtime means they're paid either at time and a half or double time or something.

THE WITNESS: Right. Right, or if they work on their day off.

THE COURT: If if they work on their day off.

THE WITNESS: Uh-huh.

THE COURT: Alright, now, for the other Sergeants who don't work in that department, do you ever give comp-time for those Sergeants? Comp-time is commonly used in the Federal system meaning if you work ten hours in one day, the next day you only have to work six.

THE WITNESS: No.

THE COURT: So Sergeants are not given any comp-time in your department at all?

THE WITNESS: No.

THE COURT: Alright. I have no,—

MR. LIEBIG: I just want to make clear for the witness and the record. When he said never give them comp-time in your department, he meant in Traffic, in your section, not in the whole St. Louis Police Department.

THE WITNESS: Right.

* * * *

TRIAL TRANSCRIPT VOLUME III

September 17, 1993

Testimony of Lt. John Burke

[32] BY MR. LIEBIG:

Q Are some of the Sergeants under your command, paid at times, overtime at time and a half, through federal funding or some other program?

A Yes, through a Federal Grant.

Q And is that Federal Grant related to FAST, or one of the other,—

A Through the FAST Unit, yes sir.

[33] Q And so when they're working under the federal authority they're treated as non-exempt from the *Fair Labor Standards Act,* and get overtime?

MR. RENICK: Objection,—

MR. LIEBIG: If you know?

MR. RENICK: —it calls for a legal conclusion. This man has no legal training, he doesn't know whether somebody's exempt or not exempt.

MR. LIEBIG: Alright.

BY MR. LIEBIG:

Q But when they're working under the federal thing, do they get time and half pay?

A Yes sir they do.

MR. LIEBIG: Okay. Thank you.

THE COURT: Thank you very much Lieutenant. You may step down.

* * * *

September 17, 1993

Testimony of Lt. Col. Raymond Lauer

[166] Q Colonel Lauer, in respect to the overtime pay for flood duty, for flood overtime, you received some personally?

A Yes sir I did. Yes sir.

Q And I assume, Lieutenants, Captains, received some?

A Yes sir.

Q And Sergeants also?

A Yes sir.

Q And did the Sergeants get it based upon the number of hours overtime they worked?

A It was based on the number of hours past eight that they worked.

Q The number of overtime hours that they worked?

A Yes sir.

Q And at the time this decision was made, and at the time the Department agreed to pay that overtime, there was no fund from which it could come, other than the general revenues of the St. Louis Metropolitan Police Department, isn't that correct?

A Yes sir, that's my understanding.

Q And so the St. Louis Metropolitan Police Department agreed, out of their revenue, nobody else's, to pay overtime?

A They did, right. Their flood emergency had been declared, but I understand,—I'm not certain how the payments were made, but it's my understanding that it was.

* * * *

September 17, 1993

The Court

[196] MR. RENICK: Alright. The other issue is, before I rest, we need to clarify the Court's ruling on the salary basis test, because I want to make sure that we have an agreement that all Plaintiffs, if they're similarly situated, that's it's been argued or bound by the previous ruling, and clarify that ruling.

THE COURT: You mean the Lieutenant Indelicato matter?

MR. RENICK: Right.

MS. RONZIO: Right.

THE COURT: I don't think there's any question in my mind, that ruling shall remain the same. I've not been impressed with the arguments that there's any distinction.

MR. LIEBIG: Your Honor,—

THE COURT: But I'll do this,—

MR. LIEBIG: —if that's the case, just to point out,—

THE COURT: —well I'll do this, since you haven't presented your case, I'll give an opportunity to present your arguments at the time, but I tell you now, I see no persuasive argument that we should make a change in the [197] Lieutenants.

MR. LIEBIG: Your Honor, that's not,—oh, the change in the Lieutenants, because you've already ruled that they're non-salaried,—

THE COURT: That's correct.

MR. LIEBIG: —we have no problem with that. I thought what Mr. Renick was arguing, is that that ruling also made a ruling with regard to the Sergeants, but all of them were salaried and not hourly, and that that was settled. And if that,—I think it's quite clear if you read the ruling, it doesn't say that, so that one, we don't think you should rule that, at least until you hear our evidence, but certainly if you intend to rule that, I think it's quite clear, and obviously your Honor could read it, or someone else could read it, but we ought to make that clear, because it certainly doesn't say that in the ruling.

THE COURT: Well I didn't think we were talking about that. If that's what you're talking about, I'll give you,—I won't rule on it until I've heard your side of the argument. I think the cases are clear though, that these things are not,—these are not guidelines that are set in concrete, these are characteristics, these are indications, indica if you will, as to whether a person is exempt or not. I don't think I have any ruling that says "If a person is paid extra money, that automatically means that they are [198] exempt or not exempt." I don't think,—I haven't read any case that says that. All I've said, all the District Judges that ruled before me have said, "An indication

of exemption is so and so," or "An indication of this, is so and so," that's all they've said, these are characteristics. Each case is individual, for example, Police Departments,—this is I think, a quasi-military organization, but there's all kinds of quasi-military organizations, and they don't all fall in the same category, and they don't all have the same rules. The rules that the Police Department follow here, are not the rules that I remember from World War II days, in the Army and the Air Force. So I don't know whether we've got a clear cut case that says every Police Department must follow the rules as drafted. Each one of these are different, that's why I asked the Chief if he knew what happened in Kansas City, because St. Louis and Kansas City are the two largest Police Departments in the State here. And there's any number of other Missouri Departments, much smaller in nature, that have varying degrees of quasi-military operations. So I'm going to go on the assumption, I'll tell you now, unless somebody can show me differently, and you'll have to show me, because I don't believe it's true, that I have not read any case in the Eighth Circuit or any other places that says, "These are the rules that always apply." These are rules that may apply, these are characteristics, these [199] are examples of one condition or another. And so each one has to be examined in it's totality, and we can't arrive at any general answers that applies to every one of these Police Departments. Okay, if that be true,—

* * * *

TRIAL TRANSCRIPT VOLUME IV

September 20, 1993

Testimony of Sgt. Dana Sanders

[57] Q Okay. Do you know if your,—would your currently, now, the job you're in now, are you subject to being disciplined for infractions of the manual, such as insubordination, in which you could lose pay?

A Yes sir.

Q And if a pay period could you be suspended for a day?

A Yes sir.

Q And if you were suspended for a day, then your pay check for that period would be reduced,—

A Yes sir.

* * * *

[59] BY MR. RENICK:

Q Sergeant you've never been disciplined, have you?

A Yes sir I have .

Q As a Sergeant?

A No sir.

Q You've never been suspended as a Sergeant?

A No sir.

Q Never suffered any loss of pay as a Sergeant, because you didn't work any certain number of hours?

A No sir I have not.

* * * *

September 20, 1993

Testimony of Sgt. Michael Frederick

[95] Q Okay. Do you have any authority to reduce the pay of the men you supervise?

A No sir.

Q Can their pay be reduced for violations of the rules and regulations of the Department?

A Yes it can.

Q Can they be suspended without pay?
A Yes they can.
Q Can they be suspended without pay for periods of less than a week, like for a day?
A Yes sir.
Q Can Sergeants be suspended without pay for a period of less than a week? For a day?
A Yes sir.
[96] Q For disciplinary infractions?
A Yes sir.
Q Have you ever been disciplined as a Sergeant?
A No sir.
Q Do you know of any Sergeants who have been disciplined and suspended?
A Yes sir.
MR. RENICK: Objection, it's hearsay.
THE COURT: He's answered, he doesn't know any.
MR. LIEBIG: He answered that he did, but the,—
THE COURT: Oh, did you say you did?
THE WITNESS: Yeah I do.
MR. LIEBIG: But there was an objection,—
THE COURT: What's your objection then counsel?
MR. RENICK: The objection is hearsay as to what might have happened to some other Sergeant.
THE COURT: Well, not the fact that he's heard, I thought he said no.
MR. LIEBIG: It's not proven yet,—
THE COURT: Alright.
MR. LIEBIG: —but for what it's worth, there's no jury, we'll go on I understand the point.

* * * *

TRIAL TRANSCRIPT VOLUME V

September 21, 1993

Testimony of Sgt. Michael Guzy

[65] Q Do you on occasion in a twenty-eight day period work more than one hundred and seventy-one hours?
A Yes sir.
Q And when you do, do you receive overtime pay?
A No sir.
Q Do any Sergeants receive overtime pay that you know [66] about?
A In the St Louis Police Department, I know that the Sergeants that are detached to the Federal task force receive overtime compensation. I know Sergeants in Kansas City receive time and a half or comp time at their discretion for their overtime.

* * * *

[69] Q Yes sir. Let me show you what we've marked as Defendant's Exhibit II and ask you to look at page 63 here, "Violation of Department Residence Policy", what does it [70] show as the penalty?
A Dismissal.
Q Alright, so that has been changed since the time that you were suspended, correct?
A The penalty has, yes.
Q And when you said you agreed to the, to be suspended without pay for two days, what does that mean?
A I was told that if I didn't accept the two day suspension, I would face dismissal .and rather than risk my career, I took the two day suspension. It is my belief that I was in compliance with this rule and it has always been my contention that I was.
Q You had a right to a Board hearing, of course?
A Yes I did.

Q Correct, and you chose not to exercise that right?
A On the advice of counsel, I took the two days suspension.

* * * *

[87] Q The, you were suspended earlier for a violation of the manual that has since been revised to provide for a different penalties, but am I right in understanding that you're subject to, in the manual, the disciplinary code. You're completely subject to the discipline in code and you could be disciplined for any of the things listed there?
A Yes sir.
Q And in 1990 there was actually a period, a work period in which you received a two day suspension and lost pay as a result of those disciplinary actions, correct?
A Yes sir.

* * * *

[91] Q Okay, now, let's clear up this one thing. You accepted a two day suspension because you didn't want to risk getting fired, correct?
A That's correct.

* * * *

September 21, 1993

Sergeant Charles Metzner

* * * *

[130] When did you become a Sergeant, Sergeant Metzner?
A July 2, 1978.
Q Okay. Do you recall sometime since 1978 that,— at [131] that time, were you getting paid time and a half?
A I believe we were, sir.
Q When you worked overtime?
A Yes sir.
Q And then at some point in time there was a change in that procedure?
A Yes sir.
Q Do you remember when that was?
A Not off hand. It was shortly after that.

Q Early, was it around 1980?
A I would think so. I guess I was a Sergeant about a year when that went into effect.
Q And you understood at that time that the department had determined that Sergeants would be paid strictly on a salary basis?
A If I recall, we were originally paid eight percent of our salary in lieu of being paid overtime. We got an extra eight percent on top of our, what the State Legislature set down.
Q At the point in time when the department changed you from being eligible for overtime, they gave you an eight percent increase in your salary to account for the change, correct?
A They gave us eight percent to cover the overtime that we worked which was added to our base salary. It wasn't [132] it didn't accrue into our pension as no overtime does in our department. But this eight percent didn't accrue into our pension system so it was in lieu of however many hours of overtime you worked. They gave you an extra eight percent.
Q So they increased your salary by eight percent and each year, that eight percent has stayed in your salary so that when you got wage increases,—
THE WITNESS: Our,—
MR. RENICK: Let me finish the question.
THE WITNESS: Okay.

BY MR. RENICK:

Q When you got wage increases, it was, that eight percent was built in, wasn't it?
A At one particular time, I'm not sure I understand your question but I'll try and answer it. We got X amount of dollars as our salary. The department for a period of time, now, I can't remember exactly how long, gave us Sergeants, I believe Lieutenants, Captains, et cetera, eight percent over and above their salary. I mean, our salary was X and we got eight percent of that X in lieu of working however many hours overtime. Later on the depart-

ment decided that they would take that eight percent and just make it straight into our salary so that was part of our salary.

[133] And it's been that way ever since?

A Yes sir.

Q So that when you get a raise, that eight percent continues to compound? I mean, the raise is given on your salary plus that eight percent, right?

A Well, we don't have that eight percent anymore.

Q You don't have it, where did it go?

A It was, I mean, as overtime, it was acclimated into our salary.

Q Okay. Well, you're still getting it then, aren't you?

A Yes.

Q Okay. And you understood that as a result of that eight percent, you weren't going to be paid time and a half like a police officer anymore?

A I didn't understand it but, yeah, that's what they told us.

Q Now you understand it.

A I understand that they told us that we weren't eligible for overtime.

Q And you understand now that you're paid a salary and that compensates you for however many hours you have to work?

A According to the police department, yes sir.

* * * *

[138] EXAMINATION BY THE COURT

THE COURT: I'm curious about this eight percent, the history of the eight percent. I've heard about this during the time before we began the trial of the case but there's confusion in my mind about it. Let me go back [139] a little bit. How long have you been on the police department?

THE WITNESS: Over twenty-two years, sir.

THE COURT: And during the twenty-two years ago would be somewhere in the neighborhood of '62, '63, something like that?

THE WITNESS: No, sir I joined,—

THE COURT: '72, '73, I'm sorry.

THE WITNESS: Joined in 1971.

THE COURT: Okay. That was the time when I was a State Judge and I left the State so that's why I'm a dinosaur and I remember these things. At the time that I was in the State Court, my understanding was that officers were not given either, any overtime pay at all, not palrolmen, not Sergeants.

THE WITNESS: Correct.

THE COURT: They were given compensatory time.

THE WITNESS: Compensatory, yes sir.

THE COURT: And I assume that's the policy still, until this case came along, I assumed that policy was still in existence. But that policy is no longer in existence, —

THE WITNESS: No sir.

THE COURT: —for the detectives. How long have they, the patrolmen been receiving overtime pay? [140] Approximately?

THE WITNESS: I think it was either 1977 or 1978. I was back at that particular time, I was in Homicide and I recall being paid overtime.

THE COURT: Alright. The Sergeants and those above the Sergeant rank did not receive any overtime then?

THE WITNES: Originally Sergeants received overtime pay.

THE COURT: Oh, there was a time when they did?

THE WITNESS: Yes sir.

THE COURT: And how long did that last approximately? Just a year or two before this eight percent began?

THE WITNESS: I think it was shortly after I was promoted.

THE COURT: Which was,—?

THE WITNESS: In 1978, July.

THE COURT: Alright.

THE WITNESS: I think it was shortly after that when they stopped paying overtime to Sergeants.

THE COURT: And that's when they started the eight percent which was to compensate for the overtime for the Sergeants.

THE WITNESS: Sergeants and above.

THE COURT: And above?

[141] THE WITNESS: Yes sir.

THE WITNESS: So that all of the rank, all of the commissioned officer, those above the rank of Sergeant,—

THE WITNESS: I think except for the Chief.

THE COURT: Except for the Chief, and then what you said was, that eight percent was not counted against your, was not counted in favor of your retirement benefits and so on,—

THE WITNESS: Yes sir.

THE COURT: But it was just an eight percent added on?

THE WITNESS: Yes sir.

THE COURT: Then later on that eight percent was folded into the salary so that for example, if you were getting thirty thousand dollars ($30,000.00) a year plus eight percent, they'd add the eight percent and it would be counted for your retirement.

THE WITNESS: They just,—if I recall correctly and this was quite a few years ago, they folded it in saying that we weren't going to be paid overtime anymore.

THE COURT: Alright.

THE WITNESS: But since it was already,—

THE COURT: A part of your salary.

THE WITNESS: A part of it, yeah, that they would keep it in there.

[142] THE COURT: They'd keep it going. But that then, entitled you to increase your pension because this

eight percent would now be counted as part of your salary and you'd pay the pension based on how much you make, I suppose?

THE WITNESS: Yeah, based on a three year average.

THE COURT: Alright. And then 1984, '85 comes along and the good Federal Government comes in with their *Fair Labor Standards Act* and does something that changes things around and now they include public agencies as well as private agencies in their ruling. That's basically what I think happened?

THE WITNESS: Yes sir.

THE COURT: Alright. Then these suits were filed because there was a change in the Federal Law according to what you and your fellow Plaintiffs believe and that you now think that the Federal Law provides you the opportunity to ask for overtime pay along with the detectives and the patrolmen?

THE COURT: Yes sir. That's all I'm going to say. Do you want to clear up anything? Go ahead.

MR. LIEBIG: No we have nothing further.

* * * *

September 21, 1993

The Court

[158] * * * Now, what I've come to the conclusion now and educate me, both if you can, is that all the Eighth Circuit cases are saying and all the other cases that I've read are saying is, these are characteristics which can help the finder of facts make a determination as to whether these employees are exempt or not. They're not automatic that if one thing or the other is true, that automatically puts you in one class or another. There are some cases that say, "If you get any extra money, you're in one class." There are some cases that say, "If you can't be disciplined and you can't be suspended for a day or two, that puts you in one class." Those are as I read the cases, simply characteristics of what are qualifications or characteristics of exempt and non-exempt employ-

ees, but none of them are so sacrosanct that if you have any one [159] them or any two of them or even three or four of them, that you're automatically in one class or the other. As I see it, I've got to make a decision on the facts. Each case is separate and this is unique from all other cases so, the fact that Kansas City may pay their Sergeants and St. Louis County may pay their Sergeants, does not mean that St. Louis must pay their Sergeants. This is, I frankly think that the *Fair Labor Standards Act* was designed not for these kinds of groups, but for groups in which there are large numbers of very weak, unpopular, uneducated people who could be abused very easily, so the immigrants and the racial minorities and people like that, that they had to look out for, the cooks, the stable workers, people that had the lowest job, that had no influence at all, they had to be protected with some kind of a Federal cover. Whether it should be extended now to all of these groups, including police departments, I'm not certain. Again, educate me, and if you can show me that they clearly should apply, then I want to know that but I don't see that clearly. I see cases holding that way but I see cases holding the other way. So in summary, what I'm telling all of you now is, obviously, I have not made up my mind about the case. I've played the ping-pong role here. The balls have bounced back and forth and so has my mind, so I have not decided on the case in any way.

* * * *

September 21, 1993

The Court

[168] MR. RENICK: And I want to for the record, I also want to file a motion dismiss for lack of jurisdiction.

THE COURT: Alright.

MR. RENICK: To preserve our argument that the *San Antonio Decision* is wrong.

THE COURT: Alright.

MR. RENICK: That this is the extension, as the Court has noted, of the *FLSA* to the governmental agencies, particularly in this case, has caused significant problems and we believe it's unconstitutional. We recognize that the Supreme Court has held otherwise,—

THE COURT: Yes.

MR. RENICK: —but they have previously changed their mind. If they change their mind again, we want to preserve the right to make this argument.

THE COURT: You have the right to do that.

MR. RENICK: If we go to the Eighth Circuit or before the Supreme Court.

THE COURT: You have a right to do that and there might be some distinction too, between those cases but I'll allow you to file that.

MR. LIEBIG: Just for now, because of the short [169] briefing schedule and to get the tapes over with, I would ask that we deal with his motion to dismiss, in other words, to overrule the Supreme Court ruling under the *Fair Labor Standards Act* right now, I'll make my argument right now that the Supreme Court's already ruled on that. We don't need to rethink.

THE COURT: I do. It's denied at this time. That gives him the right to preserve his record. You have something else. Okay, come right here. No closing remarks. Go ahead, I'm sorry.

* * * *